

NO. 04-21-00016-CV

FILED IN
4th COURT OF APPEALS
SAN ANTONIO, TEXAS

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MICHAEL A. CRUZ
Clerk

IN THE COURT OF APPEALS

FOURTH SUPREME JUDICIAL DISTRICT

SAN ANTONIO, TEXAS

* * *

IN RE MICHELE CAREY GARCIA

* * * *

**REAL PARTY IN INTEREST ROGELIO LOPEZ JR.'S RESPONSE TO
RELATOR MICHELE CAREY GARCIA'S MOTION FOR EMERGENCY
TEMPORARY RELIEF AND PETITION FOR WRIT OF MANDAMUS**

* * * *

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**ATTORNEYS FOR REAL PARTY IN
INTEREST ROGELIO LOPEZ**

January 10, 2022

NO. 04-21-00016-CV

* * *

**IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
SAN ANTONIO, TEXAS**

* * *

IN RE MICHELE CAREY GARCIA

* * * *

**REAL PARTY IN INTEREST ROGELIO LOPEZ JR.'S INITIAL RESPONSE
TO RELATOR MICHELE CAREY GARCIA'S MOTION FOR EMERGENCY
TEMPORARY RELIEF AND/OR PETITION FOR WRIT OF MANDAMUS**

* * * *

TO THE HONORABLE COURT OF APPEALS:

Real Party in Interest ROGELIO LOPEZ, JR., BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1 ("Lopez"), files this initial response to the Motion for Emergency Temporary Relief filed by Relator Michele Carey Garcia. It is requested that prior to any ruling as to the mandamus relief requested, if necessary, Real Party in Interest Lopez be granted am opportunity to file a more thorough and detailed response to the request for mandamus. The request for emergency relief and mandamus were filed at 1:49 am this morning on January 10, 2022, without prior notice and/or without conferring regarding the two matters by

opposing counsel.

Factual Background

This is not the first visit to this matter. A request for mandamus was filed by Real Party in Interest Judge Rogelio Lopez regarding the issues involved on December 16, 2021 (See Exhibit 3 mandamus filed in No. 04-21-00558-CV in this Court of Appeals). A response was filed by Real Party in Interest in that matter Monica Alcantara on December 18, 2021 (Exhibit 4). A reply to the response was filed by Lopez (Exhibit 5). The court eventually denied mandamus relief on December , 2021 (see order at Exhibit 6).

As a result, Real Party in Interest filed his Original Petition and Request for Temporary Restraining Order, Temporary Injunction and/or Permanent Injunction on December 27, 2021, in Cause No. 2021CI26103 filed in the 225th District Court of Bexar County, Texas (See attached Exhibit 7). Because the matter is an election matter, an emergency hearing was held on January 5, 2022, before the Honorable Judge John Gabriel. The hearing began without objection. At the commencement of the hearing, a temporary and/or permanent injunction was requested because it was an election matter; No objection to the requested relief was made by any party, including Bexar County Democratic Chairwoman Monica Alcantara and/or her counsel, candidate Michele Garcia and/or her counsel and/or candidate Alan Whitby who appeared Pro Se.

Evidence was presented by Lopez regarding the reasons that candidates Garcia and Whitby were disqualified and/or removed from any potential ballot for the

position of Justice of the Peace, Precinct 4, Place 1. Essentially, there were no objections to the evidence presented that served as the basis for the disqualification of candidates Garcia and/or Whitby nor to the request for a permanent injunction at the end of the hearing. More importantly, Chairwoman Alcantara testified that if presented with all of the evidence presented at the hearing, candidates Garcia and Whitby should have been and should be disqualified and their applications rejected.

The Honorable retired Judge John Gabriel presiding made his ruling on January 6, 2022, and signed his order on January 7, 2022. (**A copy of the order is attached as Exhibit 1 and the transcript of the ruling hearing setting out his reasoning is attached as Exhibit 2**). As is clear from the ruling hearing transcript, all parties agreed that all of the relevant evidence was submitted and there would be no new evidence. There was no objection to the request that the order should be entered as a permanent injunction because it was an election matter and Bexar County Elections Administrator Jacqueline Callanen testified that the first relevant deadline for her to submit the final ballot information for the position was January 13, 2022 (see highlighted approval at pp. 6-9 of the attached transcript) (See also Callanen Affidavit submitted to this court for informational purposes as Exhibit 8). She testified to the matters in the affidavit at the hearing).

Mandamus Arguments

Generally with regard to the Relator's arguments, the prior denial of the mandamus filed by Judge Lopez was of no relevance. Denial of mandamus is not relevant in this case nor is it an adjudication nor comment on the merits regarding the

prior request for mandamus relief filed prior to the current injunction matter. *See In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004) (Exhibit 9); *San Patricio County v. Nueces County*, 492 S.W. 3d 476, 487 (Tex. Civ. App. -- Corpus Christi 2016) (Exhibit 10)

Equitable Relief is Not Available

Finally, counsel for Garcia continues to incorrectly argue that caselaw allows for equitable relief and allows for Garcia to correct and amend her application for office. As was pointed out, the statute was amended in 2011 and equitable relief is not available. In 2011, the legislature amended section 141.032 of the Election Code by adding Subsection (g), to state that "a candidate may not amend an application filed under Section 141.031" and "the authority with whom the application is filed may not accept an amendment to an application filed under Section 141.031" after the filing deadline. *See Act of May 19, 2011, 82d Leg., R.S., ch. 254, § 1, 2011 Tex. Gen. Laws 834, 834* (codified at Tex. Elec. Code Ann. § 141.032(g)).

After the 2011 amendments, the express, unambiguous terms of section 141.032(g) of the Election Code prohibits a candidate from amending an application after the filing deadline and prohibits a party chair from accepting such an amendment. *See Tex. Elec. Code Ann. § 141.032(g); Tex. Gov't Code Ann. § 311.016(5) (West 2013)* (" 'May not' imposes a prohibition and is synonymous with 'shall not.' "). In the context of the Election Code, the meaning of the statute is clear: a candidate's application must be timely filed with the appropriate authority by the filing deadline and a candidate may only amend the application during the time period

in which the candidate is allowed to file a new petition. See TEX. ELEC. CODE Ann. § 141.031(a)(3) (requiring candidate to timely file application), § 141.032(a), (e), (g) (requiring authority with whom application is filed to review application for compliance with procedures, including timeliness of filing, requiring application not timely filed to be rejected, and prohibiting amendments to application after filing deadline). Therefore, the meaning of the statute-candidates are prohibited from filing, and party chairs are prohibited from accepting, amendments to applications after the filing deadline-is clear, and the court may not disregard the express terms of the statute. *See Gonzalez v. Guilbot*, 315 S.W.3d 533, 541 (Tex.2010) ("Our chief aim is to determine and give effect to the Legislature's intent, and where the statutory language is straightforward, it is determinative.").

The plain meaning of the statute is unambiguous, the legislature intended to change the law, and the legislature enacted subsection 141.032(g) with the intent to prohibit a candidate from filing, and the authority with whom an application is filed from accepting, an amended application for a place on the ballot after the statutory filing deadline. As a result, the court must construe subsection 141.032(g) to prohibit the trial court in this case or Chairwoman case from granting a candidate an opportunity to file an amended application and from requiring a party chair to accept an amended application after the filing deadline. *See In re Wilson*, 421 S.W.3d 686, 689 (Tex. App. - Fort Worth 2014, orig. proceeding) (denying petition for writ of mandamus to compel chair of Tarrant County Democratic Party to include candidate's name on ballot and stating that "it appears that the legislature has foreclosed the

opportunity to cure any defects in an application or petition discovered after the filing deadline").

The statutes and the caselaw are clear that in this case, Chairwoman Alcantara, as the Bexar County Democratic Chair, has a mandatory and ministerial duty to reject Whitby's and Garcia's applications and refrain from allowing and/or providing for correction or amendment of the submitted applications.

Counsel for Chairwoman Alcantara and Alcantar herself acknowledged the defects in the Petitions. (see attached Petition for Mandamus Response at Exhibit 6). He further indicated that Plaintiff's request for relief in the Fourth Court of Appeals was premature. He acknowledged that once the statutory time permitted for the Chairwoman to review the applications had passed, that the applications would likely have been rejected. As a result, it is believed it was the basis the mandamus was rejected by the Fourth Court of Appeals. The applicable time has passed, and Chairwoman Alcantara has failed to comply with her mandatory and ministerial duty, which has necessitated the further bringing of this action. As a result, it was proper for the District Judge to reject the applications and disqualify Garcia and Whitby. Therefore, there is no basis for the emergency relief requested and both the request for emergency relief and mandamus should be denied.

Temporary vs. Permanent Injunction

Lopez' Petition in this matter is titled "Plaintiff's Original Petition and Application for Temporary Restraining Order and/or Temporary and/ Or Permanent Injunction." (See Exhibit 7) Paragraph 47 of the Petition specifically requests a

permanent injunction as relief. (Exhibit 7 at pg. 22 paragraph 47; Exhibit 7 pg. 25 d). As such there was no surprise for any party when the Court addressed this issue. At the hearing, a temporary and/or permanent injunction was requested without objection. At the hearing there was no objection by any party to entry of a permanent injunction.

Moreover, even if the Court erred in issuing a permanent injunction instead of a temporary injunction, the appropriate relief is to remand to the trial court to enter a temporary injunction and conduct a hearing on a permanent injunction. *Lavigne v. Holder*, 186 S.W. 3d 625, 629-630 (Tex. App. – Ft. Worth 2006, no pet.) ("In his original petition in the trial court, Lavigne sought both a temporary and a permanent injunction. But in his motion for summary judgment, Lavigne requested only a temporary injunction..." "Because his motion for summary judgment requested only a temporary injunction pending a hearing on his request for a permanent injunction, we remand the case to the trial court with instructions to enter a temporary injunction..."). However, in this instance, the Election Code provides for injunctive relief and any further proceedings may impeded the scheduled March 1, 2022, primary as established by the Callanen affidavit).

WHEREFORE, PREMISES CONSIDERED, the request for temporary relief and mandamus should be denied, in whole or in part, as no record of the hearing nor evidence has been provided to demonstrate the need for relief under either motion and/or all actions taken by the District Judge were proper and in compliance with the caselaw and statutes.

Respectfully submitted,

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**ATTORNEYS FOR REAL PARTY IN
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon all parties by the court's filing system and/or email on January 10, 2022, as follows:

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RESPONDENT

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this response contains 2,127 words, excluding the words not included in the word count under the rules, or 7 pages, excluding the pages not included in the page count under the rules, pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer generated document created in Word Perfect X8, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Adam Poncio _____
ADAM PONCIO

Exhibit 1

CAUSE NO. 2021-CI-26103

ROGELIO LOPEZ, JR., § **IN THE DISTRICT COURT OF**
Plaintiff §
§
VS. § **BEXAR COUNTY, TEXAS**
§
MONICA ALCANTARA, §
MICHELE CAREY GARCIA and §
ALBERT WHITBY, §
Defendants § **225th JUDICIAL DISTRICT**

**ORDER ON PLAINTIFF ROGELIO LOPEZ, JR.'S REQUEST FOR INJUNCTIVE
RELIEF**

This cause came to be heard on January 5, 2022. Plaintiff Rogelio Lopez, Jr. appeared and Defendants Monica Alcantara, Michele Carey Garcia, and Albert Whitby appeared. The Court heard Plaintiff's request for injunctive relief upon a petition verified by declaration against Defendants. This Court, having considered the evidence, the testimony, and arguments of counsel, is of the opinion that the Plaintiff is entitled to a permanent injunction against Defendants because of the following.

1. The court finds unless this Court immediately restrains the Defendants, the Plaintiff will suffer immediate and irreparable injury, for which there is no adequate remedy at law to give Plaintiff complete, final, and equal relief. More specifically, Plaintiff has shown and the court finds the following:

- a. The harm to Plaintiff is imminent because the Democratic Chair, Monica Alcantara, has abrogated her duties and must be compelled to act before the Democratic Primary Ballots are printed which, without Court intervention, will probably occur on January 13, 2022;

- b. This imminent harm will cause Plaintiff irreparable injury in that Plaintiff will have to face an opponent or opponents who would be on the ballot in violation of the Texas Election Code; and
- c. There is no adequate remedy at law which will give Plaintiff complete, final and equal relief.

2. The decision by Alcantara and the Democratic Party to place Garcia and Whitby's names on the primary ballot is not permitted pursuant to the Tex. Elec. Code, including Sections 141.032 (a), (c) & (e).

3. If an Application is submitted to the party chair, it is the duty of the party chair to "determine whether it complies with the requirements as to form, content, and procedure that it must satisfy for the candidate's name to be placed on the ballot." Tex. Elec. Code Section 141.032 (a), (c). "If an application does not comply with the applicable requirements, the authority shall reject the application." *Id.* section 141.032 (e). Now that the filing deadline has passed, Garcia and/or Whitby cannot amend, and Alcantara cannot accept, an amendment to the applications. Tex. Elec. Code Section 141.032 (g). The evidence shows the applications and/or petitions do not comply with the Texas Election Code rendering Garcia and Whitby ineligible to appear on the ballot. As a result, the applications should have been rejected. However, Alcantara may have failed to review the applications and petitions or perform her duties.

4. The Court issues this permanent injunction directing that Alcantara take all steps necessary to prevent the printing of the ballots for the office of Judge of the Justice of the Peace, Precinct 4, Place 1, that include the name of candidate Garcia and Whitby including withdrawing any certification or request she has made for printing of said ballots.

5. Defendant Alcantara and the Bexar County Democratic Party are PERMANENTLY ENJOINED from allowing either Defendant Garcia or Defendant Whitby

from appearing as candidates on the primary Ballot for the 2022 Democratic Party Primary for the office of Judge of the Justice of the Peace, Precinct 4, Place 1.

6. If Alcantara has previously certified the name of candidate Garcia and/or candidate Whitby to appear on the 2022 Democratic Party primary to the Bexar County Elections Commission, to the Secretary of State, or to any other person or entity, she is hereby restrained and enjoined and ordered to withdraw that certification and not recertify any of those names or allow those names to appear on the ballot for that office until the Court rules on the temporary and permanent injunctions sought herein.

IT IS, THEREFORE, ORDERED that the Defendant Monica Alcantara is required to fulfill her duties under the Texas Election Code and must reject the applications for the 2022 Democratic Party Primary for Bexar County Justice of the Peace, Precinct 4, Place 1 filed by Defendant Candidate Michele Carey Garcia and Defendant Candidate Albert Whitby.

The Court finds that both Defendant Garcia and Defendant Whitby's applications are defective pursuant to the Texas Election Code and accordingly must be rejected. Defendant

In the event the court's orders are not immediately provided to Plaintiff, Plaintiff will suffer irreparable harm as set out above, which cannot be remedied solely by the provision of money damages.

The court finds that a bona fide issue exists as to Plaintiff's rights to ultimate relief, including claims for declaratory relief and other available remedies.

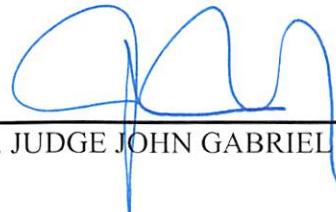
Furthermore, it appears Plaintiff has no adequate remedy at law for prevention or redress which would result if these orders are not entered. The court takes judicial notice of the court file and pleadings submitted herein and incorporates same into this order.

The Order was granted because of the immediate nature and need to preserve the status quo and notice was provided to Defendants of the intent to seek this order. This order will become effective upon delivery to each defendant by hand delivery or by delivery by email and/or by facsimile.

The clerk shall forthwith, issue a writ of injunction in conformity with the law and the terms of this judgment.

Any request for relief that is not expressly granted is denied.

Signed this 6th day of January, 2021, at 4:05 o'clock, P.M.

A handwritten signature in blue ink, appearing to read "JG".

HON. JUDGE JOHN GABRIEL PRESIDING

FORM APPROVED BY:

BY: /s/ Adam Poncio

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Exhibit 2

COPY

1 REPORTER'S RECORD

2 VOLUME 1 OF 1 VOLUME

3 TRIAL COURT CAUSE NO. 2021-CI-26103

4 ROGELIO LOPEZ, JR.,) IN THE DISTRICT COURT OF
5 Plaintiff,)
6 VS.) BEXAR COUNTY, TEXAS
7 MONICA ALCANTARA,)
MICHELE CAREY GARCIA,)
ALBERT WHITBY,)
8 Defendants) 225TH JUDICIAL DISTRICT

9 -----

10 **JUDGE'S RULING ON TEMPORARY INJUNCTION**11 **JANUARY 6, 2022**12 **REQUESTED EXCERPT**

13 -----
14
15 On the 6th day of January, 2022, the
16 following proceedings came on to be heard in the
17 above-entitled and numbered cause before the
18 HONORABLE JOHN GABRIEL, Visiting Judge, held remotely
19 via Zoom in the 225th District Court, San Antonio, Bexar
20 County, Texas:

21 Proceedings reported by machine
22 shorthand.

23
24 REBEKAH GARZA, CSR
225TH DISTRICT COURT
25 SAN ANTONIO, TEXAS 78268

DEPUTY COURT REPORTER
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31 **MR. ALBERT WHITBY**

32 DEFENDANT, APPEARING PRO SE

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2 **VOLUME 1**

3 **JANUARY 6, 2022**

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1 **E X C E R P T P R O C E E D I N G S**

2 **JANUARY 6, 2022**

3 **THURSDAY**

4 *(1:29 p.m. Before the Court.)*

5 **COURT'S RULING**

6 THE COURT: Rebekah, let's get on record.

7 And this is -- for the record, this is Cause Number
8 2021-CI-26103, Rogelio Lopez, Jr. versus
9 Monica Alcantara and the other individuals in this case,
10 Ms. Michele Garcia and Mr. Albert Whitby. All right.
11 And the Bexar County Democratic Party.

12 You know, the Court -- I was almost
13 prepared to rule yesterday. I was advised, at least, to
14 review the mandamus order and one of the cases. And the
15 Court has done so.

16 The mandamus order, there were responses
17 by all sides. I read Mr. Poncio's motion. Mr. -- I
18 think Mr. Golando had filed a response, I know Mr. Garza
19 did. And the Court had ruled. I don't remember all
20 that much because that's not what this Court does. But
21 the Court ruled -- this Court -- and I'm reading from
22 the Fourth Court of Appeals order -- this Court
23 concludes relator has not shown himself to be entitled
24 to the relief sought.

25 And there was a question of what that

1 meant, or if it included -- the Court had considered the
2 merits of the case, and whether I could even act on
3 this, but I did review the -- the appellate decisions
4 that were provided to this Court. And, apparently,
5 court of appeals seemed to use this phrase when -- when
6 for some reason they don't rule on mandamus. In one of
7 the cases, I think it was the San Patricio County case,
8 they use the same language. It said, the relator has
9 not shown itself entitled to the relief sought. But the
10 Court goes on, it did not address the issues raised in
11 the original proceeding, discuss the arguments of the
12 parties, or explain the applicable law. And the Court
13 stated, our mandamus opinion did not address the merits
14 of the issues in this appeal and is not dispositive
15 here.

16 And the other case essentially says the
17 same thing. And this was the Twenty First Century
18 Holdings, the mandamus was issued in that case, and it
19 stated that, noting that failure to grant a petition for
20 writ of mandamus is not an adjudication, nor even
21 a comment on the merits, of the case in any respect,
22 including whether mandamus relief was available.

23 And the last case I reviewed said pretty
24 much the same thing. In the bottom line, it stated that
25 this Court's failure to grant a petition for writ of

1 mandamus is not an adjudication of, nor even a comment
2 on, the merits of the case in any respect, including
3 whether mandamus relief is available.

4 So the Court is clear. Apparently, they
5 use this phrase in all the -- I assume they do, because
6 I've seen it in three different court of appeals cases,
7 but the mandamus does not preclude this Court from
8 proceeding and ruling on the merits of the case.

9 And I did read the *In re Francis* case
10 that was provided to the Court. But the Court didn't
11 read the -- the Election Code before or after that the
12 legislature has -- has enacted and -- and is in the
13 Election Code.

14 So based on everything before the Court
15 that the Court has reviewed and the testimony received,
16 I'm going to find that the petitioner has met his burden
17 of proof, that the Election Code has been violated by
18 both parties. There's a question whether they could
19 amend their petition. Reviewing the Election Code, they
20 cannot. So there was a failure to abide by the Election
21 Code. There was a failure, I believe, by Mr. Whitby's
22 part to not provide the sufficient number of petitions
23 that he was required to.

24 So the Court is granting the injunctive
25 relief, but I'm not sure if this is a temporary or

1 permanent injunction. I assume it is at least a
2 temporary injunction. If everybody agrees it's
3 permanent, it can be appealable, but I believe it was
4 set as a temporary injunction and --

5 MR. LOPEZ: Judge, if I may?

6 THE COURT: Mr. Lopez, yes, sir.

7 MR. LOPEZ: There would be no new
8 evidence at a final hearing, so this should be the final
9 injunction. And the other reason that that's important
10 is because, as Ms. Callanen testified, next Tuesday they
11 start printing ballots.

12 And so at this point, I would
13 respectfully ask that this be a final adjudication on
14 the merits and that -- again, there's no purpose in
15 having a trial because we've done that.

16 THE COURT: Well, I feel I need -- well,
17 let me ask Mr. Golando. Do you agree, Mr. Golando?

18 MR. GOLANDO: So I don't think there's
19 any difference between the temporary and permanent
20 injunction in terms of appealability. They both would
21 be subject to mandamus, theoretically. The trial
22 requires 45 days notice. I -- I can waive that on
23 behalf of BCDP, but I can't waive that on behalf of
24 Mr. Whitby and Ms. Carey Garcia. So that's my position.
25 And I haven't discussed with my client about whether we

1 waive the trial. That's probably contingent on whether
2 or not other relief is sought, so --

3 THE COURT: Understood. Okay. And,
4 Mr. Garza, do you have any -- whether this should be
5 temporary or permanent?

6 MR. GARZA: It was my understanding,
7 Your Honor, that this was noticed as a temporary
8 injunction hearing. I understand the -- the
9 circumstances that Judge Lopez indicated. There
10 probably would not be any additional evidence. I don't
11 think the evidence is really contested. It's a matter
12 of law. But similarly to Mr. Golando, I have not
13 discussed this with my client, so I cannot take a
14 position today on that.

15 THE COURT: Okay. Well, I think it was
16 set for temporary injunction, but I understand based on,
17 you know, what needs to be done this month that --

18 MR. LOPEZ: The Election Code -- the
19 Election Code does give you specific authority in
20 election cases to grant injunctive relief, which is
21 slightly different on an expedited basis. And the other
22 concern is, a temporary order is not a final
23 determination on the merits, and the cases have said
24 that. And so that can create a problem later on.

25 So I think for the interest of

1 finality -- and then if they wish to appeal, they can
2 certainly do that, but, again, because we're on a
3 deadline of next -- it's either Tuesday or Wednesday, as
4 Ms. Callanen testified, the Election Code does give you
5 that authority, and I would respectfully request, so
6 that if the parties choose to appeal, they may do so.

7 THE COURT: And I understand some may
8 want to appeal or mandamus this Court. That's not a
9 problem. I understand that's a remedy available, but I
10 do think it's easier if I do make it a permanent
11 injunction. That does offer finality for any appeal or
12 mandamus that's requested. So I think it'd be better
13 for all of those -- these unusual cases -- these
14 election cases because there is a deadline that's
15 involved that's important to everyone.

16 So the Court will make it a permanent
17 injunction and allow the parties to proceed with any
18 other remedies they want with any courts -- with the
19 Fourth Court of Appeals, if necessary. I'll make it a
20 permanent injunction.

21 MR. GOLANDO: Thank you, Your Honor, for
22 the clarity.

23 THE COURT: Okay.

24 MR. LOPEZ: Thank you.

25 THE COURT: Anything else we need to put

1 on the record?

2 MR. GOLANDO: Who's going to draft the
3 order? Are you going to draft it? Et cetera, so --

4 THE COURT: I know Mr. Poncio did file,
5 so normally he would draft it.

6 MR. LOPEZ: We'll put that -- we'll put
7 that together, Your Honor.

8 MR. BRAUN: I'll -- I'll draft, Judge,
9 and I'll circulate to everyone.

10 THE COURT: Okay, Mr. Braun. Thank you
11 so much. All right. Anything else that we need to take
12 care of?

13 MR. GARZA: Nothing else, Your Honor.

14 THE COURT: All right. Everyone stay
15 safe, and y'all are excused at this time. Take care.

16 MR. GOLANDO: Thank you, Your Honor.

17 MR. LOPEZ: Thank you, Your Honor.

18 (1:38 p.m. Court was adjourned.)

19 *-*

20 (END OF EXCERPT PROCEEDINGS)

21

22

23

24

25

COPY

1 THE STATE OF TEXAS)

2 COUNTY OF BEXAR)

3 I, REBEKAH GARZA, Deputy Court Reporter
4 in and for the 225th District Court of Bexar County,
5 State of Texas, do hereby certify that the above and
6 foregoing contains a true and correct transcription of
7 all portions of evidence and other proceedings requested
8 in writing by counsel for the parties to be included in
9 this volume of the Reporter's Record, in the
10 above-styled and numbered cause, all of which occurred
11 in open court remotely via Zoom and were reported by me.

12 I further certify that this Reporter's
13 Record of the proceedings truly and correctly reflects
14 the exhibits, if any, offered and/or admitted by the
15 respective parties.

16 I further certify that the total copy
17 costs for preparation of this Reporter's Record is
18 \$36.80 and was paid by Mr. Adam Poncio.

19 WITNESS MY OFFICIAL HAND this the day
20 10th of January, 2022.

21 *Rebekah Garza*

22 Rebekah Garza, Texas CSR #11871

23 Expiration Date: 7/31/23

24 Deputy Court Reporter-Bexar County, TX

P.O. Box 680381

25 San Antonio, Texas 78268

Phone: (210) 730-3170

Exhibit 3

04-21-00558-CV

NO. _____

* * *

**IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
SAN ANTONIO, TEXAS**

* * *

**IN RE ROGELIO LOPEZ, JR.,
BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1,
RELATOR**

* * * *

EMERGENCY PETITION FOR WRIT OF MANDAMUS

* * * *

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ATTORNEYS FOR RELATOR

December 16, 2021

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04-21-00558-CV
NO. _____

* * *

IN THE COURT OF APPEALS

FOURTH SUPREME JUDICIAL DISTRICT

SAN ANTONIO, TEXAS

* * *

**IN RE ROGELIO LOPEZ, JR.
BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1**

Relator

* * * *

EMERGENCY PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE COURT OF APPEALS:

Relator ROGELIO LOPEZ, JR., BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1 ("Relator"), petitions this court for leave to file and for this emergency writ of mandamus against Respondent/Real Party in Interest, Monica Alcantara, Bexar County Democratic Party Chairwoman ("Alcantara").

1.

PARTIES, JURISDICTION, AND RECORD

1. Relator is Rogelio Lopez, Jr., Bexar County Justice of the Peace, Precinct 4, Place 1. Relator is represented by Adam Poncio, PONCIO LAW OFFICES, P.C., 5410 Fredericksburg Road #109, San Antonio, Texas 78229-3550.

2. Respondent and Real Party in Interest is Monica Alcantara, Bexar County Democratic Party Chair, Bexar County Democratic Party Headquarters, 1844 Fredericksburg Rd, San Antonio, Texas 78201. The two candidates for office at issue are Albert Whitby and candidate Michele Carey Garcia. Counsel will supplement with addresses and contact information.

3. This court has mandamus jurisdiction over this proceeding under TEX. ELEC. CODE § 273.061, which authorizes this court to issue a writ of mandamus "to compel the performance of any duty imposed by law in connection with the holding of an election... regardless of whether the person responsible for performing the duty is a public officer."

4. This court has mandamus jurisdiction over this proceeding under TEX. ELEC. CODE § 273.061, which authorizes this court to issue a writ of mandamus "to compel the performance of any duty imposed by law in connection with the holding of an election... regardless of whether the person responsible for performing the duty is a public officer. " Moreover and/or alternatively, mandamus issues to correct a clear abuse of discretion, or the violation of a duty imposed by law, where there is no adequate remedy by appeal. *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 658 (Tex. 2000)

(orig. proceeding) (per curiam).

5. Despite being informed of defects in the applications for office, Chairwoman Alcantara has disregarded her obligation to reject the applications for office filed by candidates for Justice of the Peace Albert Whitby and candidate Michele Carey Garcia. The respective "Application for a Place on the General Primary Ballot" filed by each candidate is defective pursuant to the Texas Election Code, and accordingly must be rejected. Each respective application fails to meet the requirements prescribed in the Texas Election Code.

6. Mr. Whitby's application was accompanied by 39 pages of petitions, all of which list the candidate office as "Justice of the Peace, Precinct 4." All the petitions failed to include the place number as "Place 1." This is a defect in each of these petition pages, which renders each of them invalid.

7. Ms. Garcia's application listed the office as "Justice of the Peace, Precinct 4" and failed to include the place number as "Place 1." This is also a defect which also renders the application invalid.

8. The Texas Election Code provides "If an application does not comply with the applicable requirements, the authority **shall** reject the application. " TEX. ELEC. CODE § 141.032 (emphasis added). While Chairwoman Alcantara has been informed of the defect in the applications, she has failed and refused to reject the applications as required by law.

9. The record in this original proceeding consists of an Appendix containing verified copies of the pertinent documents.

10. Moreover, by separate motion, Relator is requesting an emergency stay in the underlying matter. It is requested that the certification to the secretary of state for the ballot in the race at issue, any drawing for placement on the ballots for respective candidates scheduled for and held on December 15, 2021, be nullified and/or that the applications be deemed or ordered rejected and that a new drawing be held for placement on the ballot. Furthermore and/or alternatively, it is requested that placing the respective candidates on the ballot be stayed until this matter can be resolved. The requested emergency stay is necessary to maintain the status quo of the parties and to preserve the Court's jurisdiction to consider the merits of the underlying orders and/or the mandamus request filed. *In re Reed*, 901 S.W.2d 604, 609 (Tex. App. -- San Antonio 1995, orig proceeding). As set out above, an emergency order is necessary in order to prevent the improper conduct of the Real Party In Interest, to order that she comply with her duties to reject the applications and to maintain this Court's jurisdiction while a determination is made regarding any abuse of discretion or failure of Alcantara to perform her statutory obligations and/or for this court to determine the merits.

II.

STATEMENT OF REQUESTED RELIEF AND COMPELLING CIRCUMSTANCES

1. PRELIMINARY STATEMENT AND ISSUES

11. This is a petition for writ of mandamus requesting that Chairwoman Alcantara be compelled to fulfill her duties and obligation to reject the applications for office filed by candidate Albert Whitby and/or candidate Michele Carey Garcia, as required by the Texas Election Code. The respective "Application for A Place on the General Primary Ballot" filed by each candidate is defective pursuant to the Texas Election Code, and accordingly must and **shall** be rejected, as required by the Election Code. Each respective application fails to meet the requirements prescribed in the Texas Election Code.

2. ARGUMENT, RELEVANT FACTS AND AUTHORITIES

The Albert Whitby Application For A Place on the General Primary Ballot

12. The Application for candidate Whitby is defective pursuant to the Texas Election Code, and accordingly must be rejected. The Application fails to meet the requirements prescribed in the Texas Election Code. Mr. Whitby's application was accompanied by 39 pages of petitions, all of which list the candidate office as "Justice of the Peace, Precinct 4." (Appendix Exhibit 1). All the petitions failed to include the place number as "Place 1." This is a defect in each of these petition pages, which renders each of them invalid. As the Democratic Party Chair and the designated filing authority, Alcantara must reject the application but has failed to do so, even though she was informed of the defects (See Notification Letters Attached as Exhibit

2). The Election Code provides as much, providing “If an application does not comply with the applicable requirements, the authority **shall** reject the application....” TEX. ELEC. CODE § 141.032 (emphasis added).

The Garcia Application For A Place on the General Primary Ballot

13. Similarly, candidate Michele Carey Garcia’s “Application for a Place on the General Primary Ballot” filed on December 10, 2021, is defective pursuant to the Texas Election Code, and accordingly must be rejected. The Garcia application lists the candidate office as "Justice of the Peace, Precinct 4" but failed to include the place number as "Place 1" (Appendix Exhibit 3) As a result, the Democratic Party Chair and the designated filing authority must reject the application. The Application fails to meet the requirements prescribed in the Texas Election Code. Nevertheless, despite being informed of the defect, Alcantara has also failed to reject the Garcia application as required.

14. With regard to both applications, section 141.031 provides that:

(a) A candidate's application for a place on the ballot that is required by this code must:

(4) include:

(c) the office sought, including any place number or other distinguishing number ...

TEX. ELEC. CODE § 141.031.

Applicable Law Establishes That the Applications Must Be Rejected

15. The Texas Supreme Court reviewed an identical case, and found that the failure to list the place number in each of the petition pages constituted a defect in

each of those petition pages, which rendered all of those pages invalid. *See In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006) (orig. proceeding) (omitting Place 8 constituted a "defect" and an "omission of the statutory requirements..."). Regarding the candidate's omission of "Place 8" on the petitions, the Texas Supreme Court went on to say:

"We agree that the omission of any statutorily required information on a petition renders signatures on that petition invalid. Section 172.027 of the Election Code says that a candidate's place number 'must appear at the top of each page of a petition.' Section 141.063(a)(4) says that a signature on a petition is invalid unless 'each statement that is required by this code . . . appears, at the time of signing, on the page on which the signature is entered.' As the Code requires a place number on each page, and declares invalid any signatures on pages without it, the trial court correctly concluded that all but 27 signatures from the district involved in this challenge are invalid."

In re Francis, 186 S.W.3d 534, 538 (Tex. 2006).

Moreover, the court went on to say:

We have strictly enforced mandatory statutory requirements for political candidacy in the past. *See, e.g., Wallace v. Howell*, 707 S.W.2d 876, 877 (Tex. 1986) (disqualifying candidate who filed application for two judicial positions and conditioned withdrawal from one on qualification for the other); *Painter v. Shaner*, 667 S.W.2d 123, 125 (Tex. 1984) (noting "statutory mandates" should be "strictly construed"); *Brown v. Walker*, 377 S.W.2d 630, 632 (Tex. 1964) (disqualifying candidate who mailed application by regular mail because applications sent before, but received after, the deadline must be sent via certified or registered mail); *Canady v. Democratic Executive Comm. of Travis County*, 381 S.W.2d 321, 324 (Tex. 1964) (disqualifying candidate who listed his legal address as one outside the relevant precinct); *Burroughs v. Lyles*, 142 Tex. 704, 181 S.W.2d 570, 573 (1944)."

In re Francis, 186 S.W.3d 534, 538 at fn 15 (Tex. 2006).

The law is clear that because all 39 of Mr. Whitby's petitions lack the "Place 1" designation, all 39 pages are invalid. Accordingly, his application must be rejected.

16. Mr. Whitby's omission was not due to his lack of knowledge. He was clearly aware that he was making an application for the Justice of the Peace Precinct 4, Place 1 position, as his "Application for a Place on the General Primary Ballot" clearly designates the office sought as "Bexar County Justice of the Peace Precinct 4, Place 1." The Bexar County Elections Department clearly recognizes that these are two distinct offices for Justice of the Peace. Further, the ballot from the 2018 General Election also clearly identifies the office designation as the "Justice of the Peace, Precinct 4, Place 1." See Media Report, Bexar County Texas, Official Reports (Appendix Exhibit 4).

17. Similarly, Garcia made the same error on her application. Her application should also be similarly rejected. “[C]andidates must bear ultimate responsibility for filing a proper application and petition.” *In re Francis*, 186 S.W.3d 534 at 541 (Tex.2006) (orig. proceeding). Each candidate is responsible for the contents of their application. *See Id.* at 543 (holding that former argued availability of limited opportunity to cure “does not absolve candidates of the need for diligence and responsibility in their filings; party chairs must only notify them of defects, not do their work for them”); *see also Escobar v. Sutherland*, 917 S.W.2d 399, 405 (Tex. App. -- El Paso 1996, orig. proceeding) (“[I]n the end, it is the candidate who must insure that the application complies with established law. If the candidate does not, he is at risk of having his candidacy rejected; if not by the County Chair, then by the courts.”); *Risner v. Harris Cnty. Republican Party*, 444 S.W.3d 327, 344-345 (Tex. App. 2014).

18. Texas courts have used a simple distinction to determine who should suffer the consequences of failing to follow the election code. If the failure to comply with the election code is something within the candidate's control, as in the present case, the candidate is kept off the ballot. *In re Parsons*, 110 S.W.3d 15, 16 (Tex. App. -- Waco 2002, no pet.), citing *Gibson*, 960 S.W.2d at 421. The error in both of the applications involved herein were errors by the candidates, particularly because of their late filing as in the *Parsons* case. There is no contention the errors involved herein were that of an election official.

19. Under these facts, Chairwoman Alcantara has no choice but to reject the applications, as her duty is both mandatory and ministerial, but she has failed to do so. The Texas Supreme Court has emphasized that the sections of the Election Code dealing with candidacy for political office are mandatory and are to be strictly enforced. *Wallace v. Howell*, 707 S.W.2d 876, 877 (Tex. 1986) (orig. proceeding). "The party chair's duty to determine whether an application for a place on the ballot complies with the statutory requirements is ministerial." *In re Triantaphyllis*, 68 S.W.3d 861, 869 (Tex. App. -- Houston [14th Dist.] 2002, orig. proceeding). The Texas Supreme Court has further made it clear that "[i]f a candidate's application does not comply with the Code's requirements, the party chair has no discretion but to reject the application and remove the candidate's name from the candidate list. TEX. ELEC. CODE §§ 141.032(e), 172.029(d); *Escobar v. Sutherland*, 917 S.W.2d 399 at 406 (Tex. Civ. App. -- El Paso 1996, orig. proceeding); *In re Gamble*, 71 S.W.3d 313 (Tex. 2002). Thus, under both the Election Code and the Texas Supreme Court's

interpretation of the Code, Chairwoman Alcantara, as the Chair of the Bexar County Democratic Party must reject Mr. Whitby's and Ms. Garcia's application.

20. Moreover, should Chairwoman Alcantara determine that she should, as the Democratic Party Chair, wish to afford an opportunity for cure, she has no authority to accept an amended application after the filing deadline. The Texas Election Code, § 172.0222 provides that:

(I) After the filing deadline:

(1) a candidate may not amend an application filed under Section 172.021; and

(2) the authority with whom the application is filed may not accept an amendment to an application filed under Section 172.021.

Tex. Election Code Sec. 172.0222 (emphasis added).

The Election Code Prohibits Amendments or Corrections After the Filing Deadline

21. Borrowing largely from the opinion in *Risner v. Harris County Republican Party*, 444 S.W.3d 327 (Tex. App. -- Houston [1st Dist.] 2014, no pet.), it is clear the Chairwoman and/or any court may not allow for the correction or amendment of any application; they must be rejected. As set out, prior to 2011, the Texas Election Code neither specifically authorized nor specifically prohibited amendments to applications for positions on a ballot after the filing deadline for such applications. Instead, the Code merely required that a candidate's application "be timely filed with the appropriate authority." TEX. ELEC. CODE Ann. § 141.031(a)(3). The Code further required a party chair to review the application within either five days or "as soon as practicable," to reject any non-compliant

application, and to immediately notify the candidate of the reason for the rejection. Id. § 141.032(a), (b), (c), (e).

22. In *In re Gamble*, *In re Francis*, and *In re Holcomb*, the Texas Supreme Court construed the statutory provisions, in conjunction with the statutory authorization in Texas Election Code section 273.081 to grant equitable relief to persons being harmed by violations of the code, to authorize courts to grant equitable relief and to allow a candidate whose application contained facial defects to cure his or her defective application after the filing deadline when the party chair failed to fulfill his or her statutory obligation to timely review the application and notify the candidate of the defects. See *In re Holcomb*, 186 S.W.3d 553, 555 (Tex.2006) (orig. proceeding); *In re Francis*, 186 S.W.3d 534, 541-43 (Tex.2006) (orig. proceeding); *In re Gamble*, 71 S.W.3d at 317-19. The supreme court further stated, however, that such "candidates should have the same opportunity to cure as they would have had before the deadline passed." *In re Holcomb*, 186 S.W.3d at 555 (emphasis added); see *In re Francis*, 186 S.W.3d at 541, 542 ("Candidates should have the same opportunity to cure as a proper review before the filing deadline would have allowed them"; stating that code allows "party chairs to focus on facial defects and call for correction before the filing deadline"; *In re Gamble*, 71 S.W.3d at 318 ("There would be no purpose to the duty to notify the prospective candidate of defects in his or her application if the intent was not to allow an opportunity to cure those defects, particularly if the defects can be corrected before the filing deadline"; "under limited circumstances, statutory deadlines may be extended to correct an official's violation

of a statutory duty"; and denying relief because "[t]here was no court decision entitling Judge Gamble to amend his application after the statutory deadline"). Consequently, the Election "Code and well-established Texas law" did not, in the absence of a court order, "permit[] a party officer to allow a candidate who filed a defective application before the filing deadline to amend his application after the deadline so the party chair can place the candidate on the ballot." *In re Gamble*, 71 S.W.3d at 319 (Baker, J., concurring).

23. In 2011, however, the legislature amended section 141.032 of the Election Code by adding Subsection (g), to state that "a candidate may not amend an application filed under Section 141.031" and "the authority with whom the application is filed may not accept an amendment to an application filed under Section 141.031" after the filing deadline. *See Act of May 19, 2011, 82d Leg., R.S., ch. 254, § 1, 2011 Tex. Gen. Laws 834, 834* (codified at Tex. Elec. Code Ann. § 141.032(g)).

24. When construing a statute, the court's ultimate goal is to effectuate legislative intent. *See Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex.2010); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex.2010). Under the plain meaning rule, the court reviews the text of the statute, and must determine the legislature's intent from the plain meaning of the words chosen "unless there is an obvious error such as a typographical one that resulted in the omission of a word or application of the literal language of a legislative enactment would produce an absurd result." *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex.1999)

(internal citations omitted); see also Tex. Gov't Code Ann. § 311.011(a) (West 2013); *Fresh Coat, Inc.*, 318 S.W.3d at 901; *Cornyn v. Universe Life Ins. Co.*, 988 S.W.2d 376, 378-79 (Tex. App. -- Austin 1999, pet. denied).

25. After the 2011 amendments, the express, unambiguous terms of section 141.032(g) of the Election Code prohibits a candidate from amending an application after the filing deadline and prohibits a party chair from accepting such an amendment. *See* Tex. Elec. Code Ann. § 141.032(g); Tex. Gov't Code Ann. § 311.016(5) (West 2013) ("'May not' imposes a prohibition and is synonymous with 'shall not.'"). The statute does not contain an obvious error, and application of the literal language of the statute does not produce an absurd result. *See Fleming*, 6 S.W.3d at 284. Moreover, in the context of the Election Code, the meaning of the statute is clear: a candidate's application must be timely filed with the appropriate authority by the filing deadline and a candidate may only amend the application during the time period in which the candidate is allowed to file a new petition. *See* TEX. ELEC. CODE Ann. § 141.031(a)(3) (requiring candidate to timely file application), § 141.032(a), (e), (g) (requiring authority with whom application is filed to review application for compliance with procedures, including timeliness of filing, requiring application not timely filed to be rejected, and prohibiting amendments to application after filing deadline). Therefore, the meaning of the statute--candidates are prohibited from filing, and party chairs are prohibited from accepting, amendments to applications after the filing deadline--is clear, and the court may not disregard the express terms of the statute. *See Gonzalez v. Guilbot*, 315 S.W.3d 533, 541

(Tex.2010) ("Our chief aim is to determine and give effect to the Legislature's intent, and where the statutory language is straightforward, it is determinative."); *Fleming*, 6 S.W.3d at 284.

26. Further, when interpreting an amendment to a statute, the court must presume that the legislature intends to change the law. *See Adams v. Tex. State Bd. of Chiropractic Exam'rs*, 744 S.W.2d 648, 656 (Tex. App. – Austin 1988, no writ); *Schott v. Leissner*, 659 S.W.2d 752, 754 (Tex. App. -- Corpus Christi 1983, writ ref'd n.r.e.). The statute was amended by House Bill 1135. Nothing in the legislative history of the bill contradicts the presumption that the legislature intended to change the law. The analysis of the House Committee Report states that the bill "amends the Election Code to prohibit a candidate for public office from amending an application for a place on the ballot ... and to prohibit the authority with whom the application or petition is filed from accepting an amendment to the application or petition after the filing deadline." House Committee on Elections, Bill Analysis, Tex. H.B. 1135, 82d Leg., R.S. (2011). In addition, according to the bill analysis of the bill as engrossed, the bill "amends current law relating to an application to run for political office." Senate Committee on State Affairs, Bill Analysis, Tex. H.B. 1135, 82d Leg., R.S. (2011). Because the court must presume that the legislature was aware of the aforementioned case law, which only allowed a candidate to file an amendment to his or her application for a position on the ballot after the filing deadline if the candidate obtained a court decision entitling the candidate to file such an amendment, the court must conclude that the legislative history, indicating that the amendment to section

141.032 "amends current law," supports the presumption that the legislature intended to change the existing law. *See In re Allen*, 366 S.W.3d 696, 706 (Tex.2012) (orig. proceeding) ("We presume that the Legislature is aware of relevant case law when it enacts or modifies statutes."); *In re Gamble*, 71 S.W.3d at 319 (denying relief for candidate seeking to remain on ballot because "[t]here was no court decision entitling Judge Gamble to amend his application after the statutory deadline"); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex.1990) ("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.").

27. This court must conclude that the plain meaning of the statute is unambiguous, that the legislature intended to change the law, and that the legislature enacted subsection 141.032(g) with the intent to prohibit a candidate from filing, and the authority with whom an application is filed from accepting, an amended application for a place on the ballot after the statutory filing deadline. As a result, the court must construe subsection 141.032(g) to prohibit the trial court or Chairwoman in this case from granting a candidate an opportunity to file an amended application and from requiring a party chair to accept an amended application after the filing deadline. *See In re Wilson*, 421 S.W.3d 686, 689 (Tex. App. – Fort Worth 2014, orig. proceeding) (denying petition for writ of mandamus to compel chair of Tarrant County Democratic Party to include candidate's name on ballot and stating that "it appears that the legislature has foreclosed the opportunity to cure any defects in an application or petition discovered after the filing deadline").

28. The statutes and the caselaw are clear that in this case, Chairwoman Alcantara, as the Bexar County Democratic Chair, has a mandatory and ministerial duty to reject Mr. Whitby's and Ms. Garcia's application and must refrain from allowing and/or providing for correction or amendment of the submitted applications.

3. RELIEF REQUESTED AND REQUEST FOR EMERGENCY STAY

29. Relator requests leave to file this Petition For Writ of Mandamus.

30. Relator further and alternatively request that the court enter temporary orders staying any placement of the two candidates addressed herein, candidate Whitby and/or candidate Garcia, from being placed on the ballot for the election for Bexar County Justice of the Peace, Precinct 4, Place 1, until this matter is determined.

31. Because the certification of the ballot must be filed with the Secretary of State by close of business on December 17, 2021, it is requested that the court stay any certification of the ballot by Alcantara or any representative of her office for Bexar County Justice of the Peace, Precinct 4, Place 1, staying the placement on the ballot or drawing for a place on the ballot for the candidates and/or temporarily abating or preventing their certification or placement on the ballot or drawing for their place on the ballot, until such time as this court can review and decide this mandamus action.

32. Relator further and alternatively requests that this Court issue a writ of mandamus to the Chairwoman Alcantara ordering Alcantara to reject the applications for candidate Whitby and/or candidate Garcia in order to allow for proper review by the court and/or, alternatively, to order that she reject the applications , in whole or

in part, as this court may deem appropriate, and for all other relief, temporary or otherwise, this court deems appropriate.

Respectfully submitted,

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Facsimile: (210) 212-5880**

/s/ Adam Poncio
BY: _____
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ATTORNEYS FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon all parties by the court's filing system, hand delivery and/or email as follows:

Ms. Monica Alcantara - by Hand Delivery
Chairwoman, Bexar County Democratic Party
1844 Fredericksburg Road
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Albert Whitby - albertwhitby@gmail.com
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Michele Carey Garcia - michelegarcia64@gmail.com
c/o Bexar County Democratic Party
1844 Fredericksburg Road
San Antonio, Texas 78201

on this 16th day of December, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this petition contains 5,079 words, excluding the words not included in the word count under the rules, or 17 pages, excluding the pages not included in the page count under the rules, pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer generated document created in Word Perfect X8, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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Exhibit 4

IN THE COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

IN RE ROGELIO LOPEZ, JR.
Relator

DIRECT ORIGINAL EMERGENCY MANDAMUS PROCEEDING
UNDER TEX. ELEC. CODE § 273.061

**RESPONSE TO RELATOR'S EMERGENCY PETITION FOR WRIT OF
MANDAMUS**

Martin Golando
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Counsel for Relators

IDENTITY OF PARTIES AND COUNSEL

Relators:

The Honorable Rogelio Lopez,
Justice of the Peace,
Precinct 4, Place 1

Counsel for Relators:

Adam Poncio
Poncio Law Offices
5410 Fredericksburg Road #109
San Antonio, Texas 78229-3550
Telephone: 210-212-7979
Facsimile: 210-212-5880

Respondent:

Monica Alcantara,
Chair, Bexar County Democratic
Party

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Real Parties in Interest:

Michele Carey Garcia

Counsel Unknown

Albert Whitby

Counsel Unknown

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STATEMENT OF FACTS

On December 14, 2021, after the close of the candidate filing period, Justice of the Peace Rogelio Lopez sent a challenge letter to Chairwoman Alcantara requesting that his opponents in the Democratic Primary for Justice of the Peace, Precinct 4, Place 1 be removed from the ballot on account of their failure to list the proper office on their signature petitions. The challenge letter demanded action by 9:00 AM the following morning. Counsel for the Bexar County Democratic Party was out of town in Austin in a Temporary Injunction hearing from December 14 - 16 and could not review the letter or its challenge by the deadline asserted by the Relator in this cause. Then, this mandamus ensued.

Counsel for the Respondent received a notice from this Court granting Judge Lopez's Emergency Motion for Stay at 4:56 PM on December 16, 2021. The Chair took immediate action to follow the court order. This Court required a response from the Respondent by 10 AM December 17, 2021.

ARGUMENT

The duty to review a candidate application is ministerial. Political Party Chairs must review each candidate application for compliance with “form, content, and procedure that its must satisfy for the candidate’s name to be placed on the ballot”. Tex. Elec. Code §141.032 (a). The review of the application must be completed by the fifth day after the application is received. *Id.* at (b). Signature petitions are included part of the application; however, “the petition is not considered part of the application for purposes of determining compliance with the requirements applicable to each document, and a deficiency in the requirements for one document may not be remedied by the contents of the other document.” *Id.* at (c). Unless the petition is challenged, the petition may only be reviewed for “facial compliance.”

The Bexar County Democratic Party (BCDP) received the applications of Ms. Carey Garcia on December 10, 2021. The BCDP received Mr. Whitby’s candidate application on December 13, 2021. The BCDP was still in active review of the candidate applications of the challenged opponents when it received Judge Lopez’s challenge letter.

Political Party chairs are placed in a difficult position when reviewing candidate applications, especially those that require signature petitions. Their duty to review candidate applications is driven by a statute, but it is also limited to reviewing applications for facial compliance until those petitions are challenged.

The deadlines are swift and often complicated by a last-minute glut of candidate applications toward the end of the filing period. Party chairs, similar to judges, have a duty to remain impartial and act as a neutral arbiter in reviewing candidate applications. If a chair fails to remain neutral in his or her review of a candidate application and acts with an impermissible motive or intent, he or she may face both criminal and civil liability. *See generally Raymond v. BCDP*, et al, No. 16-CA-395-FB (ruling that a party chair may be held liable for inappropriately denying a candidate application. Case dismissed on other grounds); Tex. Elec. Code § 141.101 (criminal liability for coercion of candidacy).

Here, the only real question before this Court is whether or not the failure to place the appropriate title of the office sought renders the signature petitions ineligible. Signature petitions are required to have the appropriate place name for the position sought by a candidate. Tex. Elec. Code § 172.027. “[T]he omission of any statutorily required information on a petition renders signatures on that petition invalid.” A candidate's place number “must appear at the top of each page of a petition.” Tex. Elec. Code § 141.063 (a)(4). The failure to provide this information on a signature petitions renders that portion of the petition invalid. *In re Francis*, 186 S.W.3d 534, 539.

The BCDP cannot take sides in this matter. It is clear that the omission of the appropriate title on the signature petitions does not follow the “form, content, and procedure” required by the Texas Election Code and the candidate applications are

likely defective and may would have resulted in the denial of the Real Parties in Interest's candidacies upon a full review of the application and given more time by the challenge letter. It is up to the Real Parties in Interest, Mr. Whitby and Ms. Carey Garcia, to explain the deficiencies in their signature petitions.

Respectfully submitted,

/s/ Martin Golando

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Counsel for Respondent

CERTIFICATE IN ACCORDANCE WITH TEX. R. APP. P. 52.3(J)

By signature below, the undersigned counsel certifies that he has reviewed the response and concluded that every factual statement in the response is supported by competent evidence included in the appendix or record.

/s/ Martin Golando

Martin Golando

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Rule 9.4(i), if applicable, because it contains 1,199 words, excluding any parts exempted by Rule 9.4(i)(1).

/s/ Martin Golando

Martin Golando

CERTIFICATE OF SERVICE

On December 17, 2021, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this petition for writ of mandamus by e-mail and by overnight commercial delivery service to:

Attorney for Relator:

Adam Poncio
Poncio Law Offices
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San Antonio, Texas 78229-3550
(210) 212-7979
(210) 212-5880

The Real Parties in Interest:

Ms. Carey Garcia
michelegarcia64@gmail.com

Mr. Albert Whitby
albertwhitby@gmail.com

/s/ Martin Golando
Martin Golando

Exhibit 5

NO. 04-21-00558-CV

* * *

**IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
SAN ANTONIO, TEXAS**

* * *

**IN RE ROGELIO LOPEZ, JR.,
BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1,
RELATOR**

* * * *

**RELATOR'S REPLY TO REAL PARTY IN INTEREST'S RESPONSE TO
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

* * * *

**Adam Poncio
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ATTORNEYS FOR RELATOR

December 17, 2021

NO. 04-21-00558-CV

* * *

IN THE COURT OF APPEALS

FOURTH SUPREME JUDICIAL DISTRICT

SAN ANTONIO, TEXAS

* * *

**IN RE ROGELIO LOPEZ, JR.
BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1**

Relator

* * * *

**RELATOR'S REPLY TO REAL PARTY IN INTEREST'S RESPONSE TO
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

TO THE HONORABLE COURT OF APPEALS:

Comes Now Relator ROGELIO LOPEZ, JR., BEXAR COUNTY JUSTICE OF THE PEACE, PRECINCT 4, PLACE 1 ("Relator"), and files this reply to the response filed by Real Party in Interest Monica Alcantara's response to the emergency writ of mandamus against Respondent/Real Party in Interest, Monica Alcantara, Bexar County Democratic Party Chairwoman ("Alcantara").

Counsel for Alcantara has filed a response that acknowledges her duties with regard to review of the applications submitted by candidates Whitby and Garcia in this matter. Real Party in Interest does not dispute the legal arguments nor factual arguments asserted by Relator that the applications of each candidate was invalid nor is the argument disputed that the applications should have been rejected.

As a result, it is clear that the mandamus should be granted without further argument or briefing.

Relator requests that this Court issue a writ of mandamus to the Chairwoman Alcantara ordering Alcantara to reject the applications for candidates Whitby and/or candidate Garcia and/or, alternatively, to order that she reject the applications, in whole or in part, as this court may deem appropriate, and for all other relief, temporary or otherwise, this court deems appropriate.

Respectfully submitted,

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/s/ Adam Poncio
BY: _____
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State Bar No. 16109800
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ATTORNEYS FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon all parties by the court's filing system, hand delivery and/or email as follows:

Ms. Monica Alcantara - by Hand Delivery
Chairwoman, Bexar County Democratic Party
1844 Fredericksburg Road
San Antonio, Texas 78201

Albert Whitby - albertwhitby@gmail.com
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Michele Carey Garcia - michelegarcia64@gmail.com
c/o Bexar County Democratic Party
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San Antonio, Texas 78201

on this 17th day of December, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this reply contains 560 words, excluding the words not included in the word count under the rules, or 3 pages, excluding the pages not included in the page count under the rules, pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer generated document created in Word Perfect X8, using 14-point typeface for all text, except for footnotes which are in 14-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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Adam Poncio		aponcio@ponciolaw.com	12/17/2021 10:42:28 AM	SENT
Albert Whitby		albertwhitby@gmail.com	12/17/2021 10:42:28 AM	SENT

Exhibit 6



Fourth Court of Appeals San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00558-CV

IN RE Rogelio LOPEZ, Jr., Relator

Original Proceeding

PER CURIAM

Sitting: Luz Elena D. Chapa, Justice
 Beth Watkins, Justice
 Liza A. Rodriguez, Justice

Delivered and Filed: December 22, 2022

PETITION FOR WRIT OF MANDAMUS DENIED

Relator Rogelio Lopez, Jr., Bexar County Justice of the Peace, Precinct 4, Place 1 petitions this court for a writ of mandamus. After considering the petition, the appendix, and the responses from respondent Monica Alcantara and real party in interest Michele Carey Garcia, this court concludes relator has not shown himself to be entitled to the relief sought. Accordingly, the petition for writ of mandamus is denied. *See* TEX. R. APP. P. 52.8(a).

PER CURIAM

Exhibit 7

2021CI26103

CAUSE NO.

ROGELIO LOPEZ, JR, Plaintiff § IN THE DISTRICT COURT OF
§
§
VS. § BEXAR COUNTY, TEXAS
§
MONICA ALCANTARA, §
MICHELE CAREY GARCIA and §
ALBERT WHITBY, §
Defendants § JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR
TEMPORARY RESTRAINING ORDER AND/OR TEMPORARY AND/OR
PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiff, Rogelio Lopez, Jr. (“Lopez”), Presiding Judge of the Bexar County Justice of the Peace Court, Precinct 4, Place 1, complaining of Defendants Monica Alcantara (“Alcantara”), in her capacity as Chair of the Bexar County Democratic Party and as a representative of the Bexar County Democratic Party, Michele Carey Garcia (“Garcia”) and Albert Whitby (“Whitby”), files this as his Original Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunction, and in support thereof, respectfully state as follows:

I. DISCOVERY LEVEL

1. Plaintiff intends to conduct discovery under level three TEX. R. CIV. P. 190.1.

II. CLAIM FOR RELIEF

2. Plaintiff's cause of action is for injunctive relief to enjoin a violation of the Texas Election Code as permitted under § 273.081 of the Code. Plaintiff seeks no monetary relief and only nonmonetary relief.

III. PARTIES

3. Plaintiff Rogelio Lopez, Jr. serves as the Presiding Judge of the Bexar County Justice of the Peace Court, Precinct 4, Place 1 in Bexar County, Texas and has served for the last 12 years. Lopez is a resident of Bexar County, Texas. The last four digits of Plaintiff's Social Security Number are 5972 and the last three digits of his Texas Driver's License number are 878.

4. Defendant Monica Alcantara is a resident of Bexar County. Alcantara is sued herein in her capacity as the Chair of the Bexar County Democratic Party and as a representative of the Bexar County Democratic Party and can be served with process herein by delivering the citation and a copy of this pleading to her at 1844 Fredericksburg Road, San Antonio, Texas 78201, or any place she may be found. She and her counsel are also being served by email as follows: Monica Alcantara, monica@electmonica.com and info@bexardemocrat.org and attorney Martin Golando at martin.golando@gmail.com.

5. Defendant Michele Carey Garcia has applied to run in the 2022 Democratic Party primary for the Justice of the Peace, Precinct 4, Place 1 bench. She is a resident of Bexar County, Texas. Garcia is sued in her individual capacity and can be served

with process at her residence, 405 E Lindbergh, Universal City, Texas 78148, or wherever she may be found. Garcia is also being served by email as follows: Michele Carey Garcia - michelegarcia64@gmail.com

6. Defendant Albert Whitby has applied to run in the 2022 Democratic Party primary for the Justice of the Peace, Precinct 4, Place 1 bench. He is a resident of Bexar County, Texas. Whitby is sued in his individual capacity and can be served with process at his residence, 8503 Eagle Crest Blvd., Windcrest, Texas 78239, or wherever he may be found. Whitby is also being served by email as follows: Albert Whitby - albertwhitby@gmail.com

IV. JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to under § 273.081 of the Texas Election Code, which provides that a “person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.” Texas Election Code § 273.081.

8. Venue properly lies in Bexar County, Texas, because a substantial part of the action forming the basis of Plaintiff’s claims against Defendants occurred in Bexar County, Texas, and Defendants reside, are located, or conduct business in Bexar County.

V. FACTUAL BACKGROUND

9. This is a petition for injunctive relief requesting that Chairwoman Alcantara be compelled to fulfill her duties and obligation as Chair and on behalf of the Bexar County Democratic Party to reject the applications for office filed by candidate Whitby and/or candidate Garcia, as required by the Texas Election Code. The respective "Application for A Place on the General Primary Ballot" filed by each candidate is defective pursuant to the Texas Election Code, and accordingly must be rejected, as required by the Election Code. Each respective application fails to meet the requirements prescribed in the Texas Election Code.

10. The Application for candidate Whitby is defective pursuant to the Texas Election Code, and accordingly must be rejected. The Application fails to meet the requirements prescribed in the Texas Election Code. Mr. Whitby's application was accompanied by 39 pages of petitions, all of which list the candidate office as "Justice of the Peace, Precinct 4." All the petitions failed to include the place number as "Place 1." This is a defect in each of these petition pages, which renders each of them invalid. As the Democratic Party Chair and the designated filing authority, Alcantara must reject the application but has failed to do so, even though she was informed of the defects. The Election Code provides as much, providing "If an application does not comply with the applicable requirements, the authority ***shall*** reject the application...." TEX. ELEC. CODE § 141.032 (emphasis added).

In addition, as set out below, Whitby's petition contains signatures of

unregistered voters, lacks other required information, has voters included who reside outside the area at issue and/or contain duplicate signatures.

11. Similarly, candidate Garcia's "Application for a Place on the General Primary Ballot" filed on December 10, 2021, is defective pursuant to the Texas Election Code, and accordingly must also be rejected. The Garcia application lists the candidate office as "Justice of the Peace, Precinct 4" but failed to include the place number as "Place 1". As a result, the Democratic Party Chair and the designated filing authority must reject the application. The Application fails to meet the requirements prescribed in the Texas Election Code. Nevertheless, despite being informed of the defect, Alcantara has also failed to reject the Garcia application as required.

VI. GOVERNING LAW

12. With regard to both applications, section 141.031 of the Texas Election Code provides that: (a) A candidate's application for a place on the ballot that is required by this code must: (4) include: (c) the office sought, *including any place number or other distinguishing number ... TEX. ELEC. CODE § 141.031* (emphasis added).

13. Applicable law establishes that the applications must be rejected. The Texas Supreme Court reviewed an identical case, and found that the failure to list the place number in each of the petition pages constituted a defect in each of those petition pages, which rendered all of those pages invalid. *See In re Francis*, 186 S.W.3d 534,

538 (Tex. 2006) (orig. proceeding) (omitting Place 8 constituted a "defect" and an "omission of the statutory requirements..."). Regarding the candidate's omission of "Place 8" on the petitions, the Texas Supreme Court went on to say:

"We agree that the omission of any statutorily required information on a petition renders signatures on that petition invalid. Section 172.027 of the Election Code says that a candidate's place number 'must appear at the top of each page of a petition.' Section 141.063(a)(4) says that a signature on a petition is invalid unless 'each statement that is required by this code . . . appears, at the time of signing, on the page on which the signature is entered.' As the Code requires a place number on each page, and declares invalid any signatures on pages without it, the trial court correctly concluded that all but 27 signatures from the district involved in this challenge are invalid." *In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006).

Moreover, the court went on to say:

"We have strictly enforced mandatory statutory requirements for political candidacy in the past. See, e.g., *Wallace v. Howell*, 707 S.W.2d 876, 877 (Tex. 1986) (disqualifying candidate who filed application for two judicial positions and conditioned withdrawal from one on qualification for the other); *Painter v. Shaner*, 667 S.W.2d 123, 125 (Tex. 1984) (noting "statutory mandates" should be "strictly construed"); *Brown v. Walker*, 377 S.W.2d 630, 632 (Tex. 1964) (disqualifying candidate who mailed application by regular mail because applications sent before, but received after, the deadline must be sent via certified or registered mail); *Canady v. Democratic Executive Comm. of Travis County*, 381 S.W.2d 321, 324 (Tex. 1964) (disqualifying candidate who listed his legal address as one outside the relevant precinct); *Burroughs v. Lyles*, 142 Tex. 704, 181 S.W.2d 570, 573 (1944)."

In re Francis, 186 S.W.3d 534, 538 at fn 15 (Tex. 2006).

14. The law is clear that because all 39 of Mr. Whitby's petitions lack the "Place 1" designation, all 39 pages are invalid. Accordingly, his application must be rejected.

15. Mr. Whitby's omission was not due to his lack of knowledge. He was clearly

aware that he was making an application for the Justice of the Peace Precinct 4, Place 1 position, as his "Application for a Place on the General Primary Ballot" clearly designates the office sought as "Bexar County Justice of the Peace Precinct 4, Place 1."

16. The Bexar County Elections Department clearly recognizes that these are two distinct offices for Justice of the Peace. Further, the ballot from the 2018 General Election also clearly identifies the office designation as the "Justice of the Peace, Precinct 4, Place 1."

17. Similarly, Garcia made the same error on her application. Her application should also be similarly rejected. “[C]andidates must bear ultimate responsibility for filing a proper application and petition.” *In re Francis*, 186 S.W.3d 534 at 541 (Tex.2006) (orig. proceeding). Each candidate is responsible for the contents of their application. See *Id.* at 543 (holding that former argued availability of limited opportunity to cure “does not absolve candidates of the need for diligence and responsibility in their filings; party chairs must only notify them of defects, not do their work for them”); *see also Escobar v. Sutherland*, 917 S.W.2d 399, 405 (Tex. App. -- El Paso 1996, orig. proceeding) (“[I]n the end, it is the candidate who must insure that the application complies with established law. If the candidate does not, he is at risk of having his candidacy rejected; if not by the County Chair, then by the courts.”); *Risner v. Harris Cnty. Republican Party*, 444 S.W.3d 327, 344-345 (Tex.

App. 2014).

18. Texas courts have used a simple distinction to determine who should suffer the consequences of failing to follow the election code. If the failure to comply with the election code is something within the candidate's control, as in the present case, the candidate is kept off the ballot. *In re Parsons*, 110 S.W.3d 15, 16 (Tex. App. -- Waco 2002, no pet.), citing Gibson, 960 S.W.2d at 421. The error in both of the applications involved herein were errors by the candidates, particularly because of their late filing as in the *Parsons* case. There is no contention the errors involved herein were that of an election official.

19. Under these facts, Chairwoman Alcantara has no choice but to reject the applications, as her duty is both mandatory and ministerial, but she has failed to do so. The Texas Supreme Court has emphasized that the sections of the Election Code dealing with candidacy for political office are mandatory and are to be strictly enforced. *Wallace v. Howell*, 707 S.W.2d 876, 877 (Tex. 1986) (orig. proceeding). "The party chair's duty to determine whether an application for a place on the ballot complies with the statutory requirements is ministerial." *In re Triantaphyllis*, 68 S.W.3d 861, 869 (Tex. App. -- Houston [14th Dist.] 2002, orig. proceeding). The Texas Supreme Court has further made it clear that "[i]f a candidate's application does not comply with the Code's requirements, the party chair has no discretion but to reject the application and remove the candidate's name from the candidate list.

TEX. ELEC. CODE §§ 141.032(e), 172.029(d); *Escobar v. Sutherland*, 917 S.W.2d 399 at 406 (Tex. Civ. App.-- El Paso 1996, orig. proceeding); *In re Gamble*, 71 S.W.3d 313 (Tex. 2002). Thus, under both the Election Code and the Texas Supreme Court's Page -9- interpretation of the Code, Chairwoman Alcantara, as the Chair of the Bexar County Democratic Party must reject Mr. Whitby's and Ms. Garcia's application.

20. Moreover, should Chairwoman Alcantara determine that she should, as the Democratic Party Chair, wish to afford an opportunity for cure, she has no authority to accept an amended application after the filing deadline. The Texas Election Code, § 172.0222 provides that: (I) After the filing deadline: (1) a candidate may not amend an application filed under Section 172.021; and (2) the authority with whom the application is filed may not accept an amendment to an application filed under Section 172.021. Tex. Election Code Sec. 172.0222 The Election Code prohibits amendments or corrections after the filing deadline

21. Borrowing largely from the opinion in *Risner v. Harris County Republican Party*, 444 S.W.3d 327 (Tex. App. -- Houston [1st Dist.] 2014, no pet.), it is clear the Chairwoman and/or any court may not allow for the correction or amendment of any application; they must be rejected. As set out, prior to 2011, the Texas Election Code neither specifically authorized nor specifically prohibited amendments to applications for positions on a ballot after the filing deadline for such applications.

Instead, the Code merely required that a candidate's application "be timely filed with the appropriate authority." TEX. ELEC. CODE Ann. § 141.031(a)(3). The Code further required a party chair to review the application within either five days or "as soon as practicable," to reject any non-compliant application, and to immediately notify the candidate of the reason for the rejection. Id. § 141.032(a), (b), (c), (e).

22. In *In re Gamble*, *In re Francis*, and *In re Holcomb*, the Texas Supreme Court construed the statutory provisions, in conjunction with the statutory authorization in Texas Election Code section 273.081 to grant equitable relief to persons being harmed by violations of the code, to authorize courts to grant equitable relief and to allow a candidate whose application contained facial defects to cure his or her defective application after the filing deadline when the party chair failed to fulfill his or her statutory obligation to timely review the application and notify the candidate of the defects. See *In re Holcomb*, 186 S.W.3d 553, 555 (Tex.2006) (orig. proceeding); *In re Francis*, 186 S.W.3d 534, 541-43 (Tex.2006) (orig. proceeding); *In re Gamble*, 71 S.W.3d at 317-19. The supreme court further stated, however, that such "candidates should have the same opportunity to cure as they would have had before the deadline passed." *In re Holcomb*, 186 S.W.3d at 555 (emphasis added); see *In re Francis*, 186 S.W.3d at 541, 542 ("Candidates should have the same opportunity to cure as a proper review before the filing deadline would have allowed them"; stating that code allows "party chairs to focus on facial defects and call for

correction before the filing deadline"; *In re Gamble*, 71 S.W.3d at 318 ("There would be no purpose to the duty to notify the prospective candidate of defects in his or her application if the intent was not to allow an opportunity to cure those defects, particularly if the defects can be corrected before the filing deadline"; "under limited circumstances, statutory deadlines may be extended to correct an official's violation of a statutory duty"; and denying relief because "[t]here was no court decision entitling Judge Gamble to amend his application after the statutory deadline"). Consequently, the Election "Code and well-established Texas law" did not, in the absence of a court order, "permit a party officer to allow a candidate who filed a defective application before the filing deadline to amend his application after the deadline so the party chair can place the candidate on the ballot." *In re Gamble*, 71 S.W.3d at 319 (Baker, J., concurring).

23. In 2011, however, the legislature amended section 141.032 of the Election Code by adding Subsection (g), to state that "a candidate may not amend an application filed under Section 141.031" and "the authority with whom the application is filed may not accept an amendment to an application filed under Section 141.031" after the filing deadline. *See Act of May 19, 2011, 82d Leg., R.S., ch. 254, § 1, 2011 Tex. Gen. Laws 834, 834* (codified at Tex. Elec. Code Ann. § 141.032(g)).

24. When construing a statute, the court's ultimate goal is to effectuate legislative

intent. *See Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex.2010); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex.2010). Under the plain meaning rule, the court reviews the text of the statute, and must determine the legislature's intent from the plain meaning of the words chosen "unless there is an obvious error such as a typographical one that resulted in the omission of a word or application of the literal language of a legislative enactment would produce an absurd result." *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex.1999) (internal citations omitted); *see also* Tex. Gov't Code Ann. § 311.011(a) (West 2013); *Fresh Coat, Inc.*, 318 S.W.3d at 901; *Cornyn v. Universe Life Ins. Co.*, 988 S.W.2d 376, 378-79 (Tex. App. -- Austin 1999, pet. denied).

25. After the 2011 amendments, the express, unambiguous terms of section 141.032(g) of the Election Code prohibits a candidate from amending an application after the filing deadline and prohibits a party chair from accepting such an amendment. *See Tex. Elec. Code Ann. § 141.032(g); Tex. Gov't Code Ann. § 311.016(5)* (West 2013) ("'May not' imposes a prohibition and is synonymous with 'shall not.'"). The statute does not contain an obvious error, and application of the literal language of the statute does not produce an absurd result. *See Fleming*, 6 S.W.3d at 284. Moreover, in the context of the Election Code, the meaning of the statute is clear: a candidate's application must be timely filed with the appropriate authority by the filing deadline and a candidate may only amend the application

during the time period in which the candidate is allowed to file a new petition. See TEX. ELEC. CODE Ann. § 141.031(a)(3) (requiring candidate to timely file application), § 141.032(a), (e), (g) (requiring authority with whom application is filed to review application for compliance with procedures, including timeliness of filing, requiring application not timely filed to be rejected, and prohibiting amendments to application after filing deadline). Therefore, the meaning of the statute-candidates are prohibited from filing, and party chairs are prohibited from accepting, amendments to applications after the filing deadline-is clear, and the court may not disregard the express terms of the statute. *See Gonzalez v. Guilbot*, 315 S.W.3d 533, 541 (Tex.2010) ("Our chief aim is to determine and give effect to the Legislature's intent, and where the statutory language is straightforward, it is determinative."); *Fleming*, 6 S.W.3d at 284.

26. The plain meaning of the statute is unambiguous, the legislature intended to change the law, and the legislature enacted subsection 141.032(g) with the intent to prohibit a candidate from filing, and the authority with whom an application is filed from accepting, an amended application for a place on the ballot after the statutory filing deadline. As a result, the court must construe subsection 141.032(g) to prohibit the trial court or Chairwoman in this case from granting a candidate an opportunity to file an amended application and from requiring a party chair to accept an amended application after the filing deadline. *See In re Wilson*, 421 S.W.3d 686, 689 (Tex.

App. – Fort Worth 2014, orig. proceeding) (denying petition for writ of mandamus to compel chair of Tarrant County Democratic Party to include candidate's name on ballot and stating that "it appears that the legislature has foreclosed the opportunity to cure any defects in an application or petition discovered after the filing deadline").

27. The statutes and the caselaw are clear that in this case, Chairwoman Alcantara, as the Bexar County Democratic Chair, has a mandatory and ministerial duty to reject Whitby's and Garcia's applications and must refrain from allowing and/or providing for correction or amendment of the submitted applications.

28. Counsel for Chairwoman Alcantara has acknowledged the defects in the Petitions. (see attached Petition for Mandamus Response at Exhibit 6)/ He further indicated that Plaintiff's request for relief in the Fourth Court of Appeals was premature. He acknowledged that once the statutory time permitted for the Chairwoman to review the applications had passed, that the applications would likely have been rejected. As a result, it is believed it was the basis the mandamus was rejected by the Fourth Court of Appeals. The applicable time has passed, and Chairwoman Alcantara has failed to comply with her mandatory and ministerial duty, which has necessitated the further bringing of this action.

VII. ADDITIONAL GROUNDS FOR REJECTING WHITBY'S APPLICATION

29. Setting aside the defects outlined above, Mr. Whitby's application fails to be supported by the required number of valid signatures, based on several defects as

discussed further below. Specifically, the Texas Election Code provides that a candidate filing “for justice of the peace in a county with a population of more than 1.5 million, who chooses to pay the filing fee must also accompany the application with a petition … the minimum number of signatures that must appear on the petition required by this subsection is 250.” Tex. Election Code Sec. 172.021.

30. In addition to the defect discussed regarding the omission of the “Place 1” designation on all of Whitby’s Petitions, the 39 pages of petitions have 168 defective signatures which cannot be used support his application. After reviewing the defective signatures, of the 337 total signatures submitted by Whitby, only 169 valid signatures remain. Accordingly, Whitby has failed to provide the minimum number of signatures required by the election code to support his application for the Democratic Primary. The issue was squarely presented to Alcantara by letter, with included attachments (See Attached Exhibit 7). Again, however, Alcantara has failed to take any action. These defects fall into six categories described herein.

31. **First Defective Category: Signatures by an Unregistered Voter**

To be a valid signature, the signer must be a registered voter. The Texas election code provides as follows:

“§ 141.063. Validity Of Signature

(a) A signature on a petition is valid if:

(1) ... the signer, at the time of signing, *is a registered voter* of the territory from which the office sought is elected..."

Tex. Election Code Sec. 141.063 (emphasis added).

32. Whitby's petitions contain 59 signatures from unregistered voters. All 59 of these signatures are invalid under the provisions of the Texas Election code and cannot support his application for the ballot.

33. **Second Defective Category: Signatures by Voters Residing Outside of Bexar County Precinct 4**

To be a valid signature, the signer must not only be a registered voter, but the signer must also reside in Bexar County Precinct 4. The Texas election code provides as follows:

"§ 141.063. Validity Of Signature

(a) A signature on a petition is valid if:

(1) ... the signer, at the time of signing, is a registered voter *of the territory from which the office sought is elected...*"

Tex. Election Code Sec. 141.063 (emphasis added).

34. Whitby's petitions contain 50 signatures from voters who do not reside in Precinct 4. All 50 of these signatures are invalid under the provisions of the Texas Election code and cannot support his application for the ballot.

35. **Third Defective Category: Petition Signatures Must Provide Either a Date of Birth or a Voter Identification Number**

To be a valid signature, the signer's information on the petition must include *either* the date of birth, *or* the voter identification number. The Texas election code provides as follows:

“§ 141.063. Validity Of Signature

(a) A signature on a petition is valid if:

(2) the petition includes the following information with respect to each signer:

(A) the signer's residence address;

(B) the *signer's date of birth or the signer's voter registration number...*”

Tex. Election Code Sec. 141.063 (emphasis added).

36. Whitby's petitions contain 19 signatures which *fail to include both the date of birth and the voter identification number*. All 19 of these signatures are invalid under the provisions of the Texas Election code and cannot support his application for the ballot.

37. **Fourth Defective Category: Duplicate Signatures**

To be a valid signature, a candidate may have a registered voter sign a petition *only once*. To rule otherwise, would mean that one registered voter could sign a candidates petition 250 times to achieve the required number of signatures.

38. Whitby's application has 4 duplicate signatures, including one registered voter who signed the petition three times. All 4 of these signatures are invalid and cannot support his application for the ballot.

39. **Fifth Defective Category: Signatures on Lopez Application Which Later Appear on Whitby Application Are Invalid as to Whitby**

A registered voter may only sign one candidate's petition. Once a registered voter signed the Lopez petitions, that signer's later signature on the Whitby petition is invalid. The Texas election code provides as follows:

“§ 141.066. Signing More Than One Petition Prohibited

(a) A person may not sign the petition of more than one candidate for the same office in the same election.

(c) A *signature* on a candidate's petition *is invalid if the signer signed the petition subsequent to signing a petition of another candidate* for the same office in the same election.

Tex. Election Code Sec. 141.066 (emphasis added).

40. Whitby's petitions contain 3 signatures which were signed subsequent to the same signatures having been signed on the Lopez petitions. All 3 of these signatures are invalid under the provisions of the Texas Election code and cannot support his application for the ballot.

41. **Sixth Defective Category: Signatures Obtained Prior to Filing of Whitby Treasurer's Designation are Invalid**

Whitby filed an “Appointment of a Campaign Treasurer by a Candidate” form as required by the Texas Election Code.¹

His appointment took effect on December 9, 2021, the date which it was filed.² A candidate, such as Whitby, may not engage in any political activity until a campaign treasurer appointment has been filed.³ A person who violates this section of the Election Code commits an offense which is punishable as a Class A misdemeanor.⁴

42. Whitby submitted 33 petition signatures which were obtained prior to his filing of a campaign treasurer appointment. All 33 petition signatures obtained prior to the filing of the treasurer appointment constitute impermissible campaign activity. As such, petitions which pre-date the filing of the campaign treasurer appointment are legally invalid and must be rejected.

¹ “APPOINTMENT OF CAMPAIGN TREASURER REQUIRED. Each candidate and each political committee shall appoint a campaign treasurer as provided by this chapter.” **Texas Election Code Section 252.001**.

² “TIME APPOINTMENT TAKES EFFECT; PERIOD OF EFFECTIVENESS. (a) A campaign treasurer appointment takes effect at the time it is filed with the authority specified by this chapter.” **Texas Election Code Section 252.011**

³ “**§22.1. Certain Campaign Treasurer Appointments Required before Political Activity Begins**

(a) An individual must file a campaign treasurer appointment with the proper authority before accepting a campaign contribution or making or authorizing a campaign expenditure.” **Texas Ethics Commission Rules, Chapter 22, Restrictions on Contributions and Expenditures; see also**

”§ 253.031. Contribution And Expenditure Without Campaign Treasurer Prohibited

(a) A candidate may not knowingly accept a campaign contribution or make or authorize a campaign expenditure at a time when a campaign treasurer appointment for the candidate is not in effect.” **Tex. Election Code Sec. 253.031.**

⁴ **Texas Election Code Section 253.031(f).**

43. A contribution is defined to include “a direct or indirect transfer of money, goods, services, ***or any other thing of value.***”⁵ While a signature by itself is not a “political contribution,” both a Federal Court and the Texas Ethics Commission have found that gathering signatures on petition forms does in fact constitute a political contribution and/or expenditure. In support of this proposition, the Federal Court for the Southern District of Texas quoted the Texas Ethics Commission as follows:

“Tex. Ethics Comm'n, Ethics Advisory Op. No. 262 (1995) [No. 511 (2013)] (discussing whether a signature on a petition constitutes a thing of value and concluding that ‘[a] signature on a candidate's petition for a place on the ballot does not, by itself, constitute a transfer of a thing of value to the candidate and is not a political contribution’ ***but*** that ‘***any goods or services*** that are ***used or provided to obtain a signature on a candidate's petition, such as paper or personal services, would constitute a political contribution*** to the candidate’).” ***Joint Heirs Fellowship Church v. Ashley***, 45 F.Supp.3d 597, 636 (S.D.Tex.2014) aff'd sub nom., 629 Fed. App. 627 (5th Cir.2015) (emphasis added).

44. Any petition forms used by Whitby, prior to the filing of his treasurer appointment are illegal as they are the result of impermissible campaign contributions and/or expenditures. Texas Courts considering this issue have specifically found as much:

“ ...when, as here, [a party] ... fails to adhere to statutes set forth in the State Election Code by illegally procuring petitions in violation of those statutes, ***the illegally procured petitions are invalid from their inception.***”⁶

⁵ Texas Election Code Section 251.001(2) (emphasis added).

⁶ ***Cook v. Tom Brown Ministries***, 385 S.W.3d 592, 606 (Tex. App.—El Paso 2012, pet. denied).

In considering this issue, the reviewing appellate court found that the petitions involved were *illegal from their inception* because at the time the petitions were collected, *there was no designated campaign treasurer.*⁷ Accordingly, all petition signatures obtained by Whitby before the filing of his treasurer appointment are invalid and may not be used to support his application for the ballot.

45. Whitby filed his application for ballot accompanied by petitions including a total of 337 signatures. Removing the six categories of defective signatures, as this honorable Court must, Whitby's application is left with only 169 valid signatures. As this number is less than the 250 statutorily required minimum number of signatures, Whitby's application for the Democratic Primary Ballot must be rejected.

VIII. REQUEST FOR INJUNCTIVE RELIEF

46. Plaintiff Rogelio Lopez will be severely and irreparably harmed if Garcia's and Whitby's names appear on the primary ballot for March 1, 2022, as neither has met the Texas law requirements to be placed on the ballot as a candidate for the office of Justice of the Peace, Precinct 4, Place 1. The unlawful actions of the Defendants and/or failure of Chairwoman Alcantara to perform her duties will cause Plaintiff to be opposed by persons who have not filed proper applications and who are not eligible to have their names on the ballot, and Plaintiff will have no adequate

⁷ *Id.*

remedy at law to redress the wrong in question. Moreover, the inclusion of their names on the ballot will cause irreparable harm by allowing for the vote for a candidate who may be otherwise ineligible, affecting the outcome for those candidates who may be legitimately included on the ballot.

47. In light of the foregoing, Plaintiff requests this Court to issue a Temporary Restraining Order, and, after notice and hearing, a Temporary Injunction and Permanent Injunction, enjoining and restraining Alcantara from placing both Garcia and Whitby on the Democratic primary ballot, and certifying either name for the election as the democratic nominee for the office of Justice of the Peace, Precinct 4, Place 1 as both applications are invalid. Alternatively Plaintiff requests this Court issue a Temporary Restraining Order, and, after notice and hearing, a Temporary Injunction and Permanent Injunction, enjoining and restraining Alcantara and/or ordering Alcantara to perform her duties as Bexar County Democratic Chairwoman to reject one or both of the Garcia and/or Whitby applications and/or petitions seeking to place the names of Garcia and/or Whitby on the Democratic primary ballot for the office of Justice of the Peace, Precinct 4, Place 1. If and to the extent Alcantara has already certified either Garcia or Whitby to appear on said ballot, Plaintiff requests that Alcantara be ordered to withdraw said certification whether made to the Bexar County Elections Department for printing of the ballots, to the Texas Secretary of State or otherwise. Plaintiff also requests this Court enjoin

Alcantara from approving the “final proof” of the ballot including any of the named defendants.

48. Plaintiff is likely to succeed on the merits of this lawsuit because the applications submitted by both defendants are defective as a matter of law.

49. The harm to Plaintiff is imminent because the Democratic Chair, Monica Alcantara, has abrogated her duties and must be compelled to act before the Democratic Primary Ballots are to be printed on January 13, 2022.

50. This imminent harm will cause Plaintiff irreparable injury in that Plaintiff will have to face two opponents who would be on the ballot in violation of the Texas Election Code.

51. There is no adequate remedy at law which will give Plaintiff complete, final, and equal relief, unless the legally invalid applications are rejected.

IX.

52. A bona fide issue exists as to Plaintiffs’ rights to ultimate relief and Plaintiffs would request a temporary restraining order and injunction regarding same pending resolution of this litigation.

X.

REQUEST FOR DECLARATORY RELIEF

53. Plaintiff asks this Court to declare his rights and status and the rights and status of the Defendants in this matter, including the obligations of Chairwoman Alcantara

and the qualification and/or disqualification of Defendants Whitby and/or Garcia, pursuant to the Election Code.

54. A declaratory judgment is appropriate where there is a justiciable controversy about the rights and status of the parties, and the declaration would resolve the controversy. *Bonham State Bank v. Beadle*, 907 S.W.3d 465, 467 (Tex. 1995). Additionally the controversy must be real and substantial involving genuine conflict of tangible interests and not merely a theoretical dispute. *Id.*

XI. PRAYER FOR RELIEF

55. WHEREFORE, Plaintiff respectfully prays that this Court

a. Cite Defendants to appear herein.

b. That the Court issue a temporary restraining order directing that Alcantara take all steps necessary to prevent the printing of the ballots for the office of Justice of the Peace, Precinct 4, Place 1, including withdrawing any certification or request she has made for printing of said ballots until the Court can conduct a hearing regarding and rule on plaintiff's request for the Temporary and/or Permanent Injunction sought by this Petition.

c. If Alcantara has previously certified the names of either Garcia or Whitby to appear on the 2022 Democratic Party primary to the Bexar County Elections Department, to the Secretary of State, or to any other person or entity, that she be temporarily restrained and enjoined from certifying and/or ordered to

withdraw such prior certification and not recertify any of those names or allow those names to appear on the ballot for that office until the Court rules on the temporary and permanent injunctions sought herein.

d. That the Court issue a temporary restraining order requiring all persons or entities responsible for printing said ballots to delay the printing thereof until the Court rules on the temporary and permanent injunctions sought herein and for any request for declaratory relief; and further, Plaintiff prays for such other and further relief, both at law and in equity, to which he may show himself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

Automated Certificate of eService

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Angela Zepeda on behalf of Adam Poncio
Bar No. 16109800
angelazepeda@ponciolaw.com
Envelope ID: 60315650
Status as of 12/27/2021 3:44 PM CST

Case Contacts

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Monica Alcantara		info@bexardemocrat.org	12/27/2021 3:19:03 PM	SENT

Exhibit 8

AFFIDAVIT OF JACQUELYN F. CALLANEN

BEFORE ME, the undersigned authority, personally appeared Jacquelyn F. Callanen, Administrator for the Bexar County Elections Department, who, upon being duly sworn, deposed as follows:

“My name is Jacqueline F. Callanen. I am at least 18 years of age and of sound mind. I am the Administrator for the Bexar County Elections Department for Bexar County, and I have served in this capacity for 16 years. I have personal knowledge of the contents of this affidavit.

Prior to the 2018 Election, the Bexar County Commissioner’s Court abolished the Place 2 position for the Justice of the Peace Court. In doing so, the Justice of the Peace Precinct 4, Place 1 position was left intact, and the official name of the position was not changed by Commissioner’s Court. The ballot for the 2018 election listed the position as Justice of the Peace, Precinct 4, Place 1. To date, the official position has not been changed by Commissioner’s Court, and will be listed on the ballot as ‘Justice of the Peace, Precinct 4, Place 1’. Therefore, the official position should be listed as and designated as ‘Justice of the Peace, Precinct 4, Place 1’.

Bexar County prepares and prints ballots ‘in house.’ Any final adjudications regarding names to appear on the ballot must be received by January 13, 2022, in order for there to be no delay to the election schedule. This is because we must

comply with the Federal MOVE ACT for the military ballots by January 15, 2022..

FURTHER AFFIANT SAYETH NOT."

Jacquelyn F. Callanen
Jacquelyn F. Callanen

SUBSCRIBED AND SWORN TO BEFORE ME on this 23rd day of December 2021, to certify which witness my hand and seal of office.

My Commission Expires: 21 AUGUST, 22 Notary Public, State of Texas

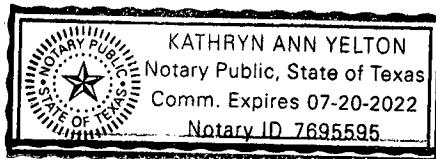


Exhibit 9

148 S.W.3d 109
Supreme Court of Texas.

In re AIU INSURANCE COMPANY, Relator.

No. 02-0648.

|

Sept. 3, 2004.

|

Rehearing Denied Dec. 3, 2004.

Synopsis

Background: Liability insurer petitioned for writ of mandamus requiring enforcement of forum-selection clause in insured's suit arising out of coverage dispute.

Holdings: The Supreme Court, [Owen](#), J., held that:

[1] as a matter of first impression, the forum-selection clause was enforceable;

[2] mandamus relief was available; and

[3] the insurer did not waive reliance on the clause.

Writ conditionally granted.

Phillips, C.J., dissented and filed opinion joined by [O'Neill](#), [Jefferson](#), and [Schneider](#), JJ.

West Headnotes (6)

[1] **Contracts** Agreement as to Place of Bringing Suit; Forum Selection Clauses

Forum-selection clause in pollution liability policy requiring resolution of all disputes in New York was enforceable in insured's suit arising out of dispute concerning coverage for contamination in Texas; the insured did not show that litigating in New York would essentially deprive it of its day in court despite claim that many witnesses lived in Texas, it was foreseeable that the insureds would be required to litigate in New York, nothing indicated

fraud or overreaching or a choice of New York to discourage claims, and Insurance Code provisions on choice of law did not require suit in Texas. [V.A.T.S. Insurance Code, art. 21.42](#); Art. 21.43, § 9 (Repealed).

51 Cases that cite this headnote

[2] **Contracts** Agreement as to Place of Bringing Suit; Forum Selection Clauses

Benefit to state residents or businesses from proceeds of pollution liability policy did not affect enforceability of forum-selection clause requiring resolution of all disputes in New York; an argument that a tribunal should consider, consciously or unconsciously, benefits to the local community in deciding whether there was insurance coverage was highly offensive to a system of justice based on the rule of law.

42 Cases that cite this headnote

[3] **Mandamus** Motions and Orders in General

Mandamus relief was available to enforce forum-selection clause in pollution liability policy requiring resolution of all disputes in New York; the insurer had no adequate remedy by appeal in insured's declaratory judgment action.

61 Cases that cite this headnote

[4] **Contracts** Agreement as to Place of Bringing Suit; Forum Selection Clauses

Subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment with no benefit to either the individual case or the judicial system as a whole.

55 Cases that cite this headnote

[5] **Contracts** Legal Remedies and Proceedings

Liability insurer did not waive reliance on forum-selection clause by delaying motion to dismiss until five months after insured filed suit,

not raising the clause in response to insured's demand letters prior to suit, or by requesting a jury trial, paying the jury fee and filing a general denial instead of a special appearance.

10 Cases that cite this headnote

[6] **Mandamus** ↗ Presentation and Reservation in Lower Court of Grounds of Review

Alleged failure to present arguments to Court of Appeals when seeking mandamus relief was not a failure to preserve error when seeking mandamus relief in Supreme Court; mandamus proceeding in Supreme Court was original proceeding.

18 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

Justice [OWEN](#) delivered the opinion of the Court, in which Justice [HECHT](#), Justice [SMITH](#), Justice [WAINWRIGHT](#) and Justice [BRISTER](#) joined.

The trial court denied a motion to enforce a contractual provision under which the parties agreed that all dispute resolution proceedings, including litigation, would take place in the State of New York. Because the facts are undisputed and the trial court clearly abused its discretion, we conditionally

grant a writ of mandamus directing the trial court to dismiss this case.

I

Louis Dreyfus Corporation obtained \$70 million of pollution liability coverage for itself and its subsidiaries from AIU Insurance Company. AIU agreed to provide an additional \$35 million in coverage in the event the initial amount was exhausted and Louis Dreyfus Corporation paid additional premiums. At the time the policy was ***111** obtained, AIU was a New York corporation with its principal place of business in New York. In the policy, Dreyfus listed its address as New York, and the broker retained by Dreyfus to obtain a policy and negotiate coverage was also located in New York. The insurance policy contained a forum-selection clause by which the parties agreed that all disputes would be resolved in the State of New York:

L. Choice of Law and Forum—In the event that the Insured and the Company dispute the validity or formation of this policy or the meaning, interpretation or operation of any term, condition, definition, or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the Insured and the Company agree that the law of the State of New York shall apply and that all litigation, arbitration or other form of dispute resolution shall take place in the State of New York.

One of Luis Dreyfus Corporation's subsidiaries was Louis Dreyfus Natural Gas Corp., a Delaware corporation with its principal place of business in Texas. This subsidiary was listed as an insured in the AIU policy, and we will refer to it as Dreyfus. A few months after the policy issued, Dreyfus merged with American Exploration Company, which had wells and a pipeline gathering system in Hidalgo County. About a year and a half after the policy became effective, Dreyfus was added as a defendant in a suit in Hidalgo County in which it was alleged that Dreyfus had contaminated the air,

soil, and ground water. The suit had originally been brought against American Exploration Company prior to the merger and about three years before the AIU policy became effective.

AIU provided a defense under a reservation of rights and disputed coverage. Dreyfus sued AIU in Hidalgo County seeking a declaratory judgment that the environmental contamination claims against it were covered. Dreyfus also sued AIU for breach of contract, insurance code violations, intentional and negligent misrepresentation, and fraudulent inducement. AIU filed a motion to dismiss based on the insurance policy's forum-selection clause. AIU also filed a declaratory judgment action against Dreyfus in New York seeking resolution of the coverage issues. The Hidalgo County trial court denied AIU's motion to dismiss, and the court of appeals denied mandamus relief. AIU petitioned this Court for issuance of a writ of mandamus.

II

This Court has never addressed the validity of a forum-selection clause like the one at issue in this case. At one time, forum-selection clauses were disfavored by American courts because such clauses were viewed as "ousting" a court of jurisdiction.¹ But in 1972, the United States Supreme

Court held in  *The Bremen v. Zapata Off-Shore Co.* that international forum-selection clauses "should be given full effect,"² absent "fraud, undue influence, or overweening bargaining power."³ Subsequently, in  *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court enforced a clause that selected Florida as the site of any litigation when the plaintiff sued in the *112 State of Washington.⁴

In the wake of  *The Bremen* and  *Carnival Cruise Lines*, five of our Texas courts of appeals have enforced forum-selection clauses that provided that litigation must be brought in a particular state.⁵ In each of those cases, the question was decided on appeal following a final judgment after the trial court enforced the forum-selection clause by either dismissing the case when the clause named a state other than Texas as the forum or holding that a defendant waived any objection to lack of personal jurisdiction by agreeing to a clause naming Texas as the forum.⁶

[1] Dreyfus contends that the forum-selection clause in its policy should not be enforced because the United States

Supreme Court has carved out exceptions that apply to the present controversy. In  *The Bremen*, the Supreme Court held that a "forum clause should control absent a strong showing that it should be set aside," and that "[t]he correct approach [is] to enforce the forum clause specifically unless [the party opposing it] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁷ The Court indicated that a clause would come within these exceptions if enforcement would contravene a strong public policy of the forum in which suit was brought, or when the contractually selected forum would be seriously inconvenient for trial.⁸ Dreyfus contends that 1) many if not most potential witnesses regarding coverage issues are in Texas, 2) article 21.42 and former article 21.43, section 9 of the Texas Insurance Code⁹ apply and require that Texas law governs, and 3) that Texas has a strong public interest in having the coverage issues litigated in Texas because insurance proceeds "could be used to benefit the health and welfare of the citizens and landowners of Hidalgo County, Texas," and the substantial amount of insurance available under the policy "is also likely to dissipate any potential adverse financial effects on" Dreyfus's successor, who has its offices in Houston and employs a large number of people in Texas. We reject each of these contentions.

*113 In  *The Bremen* the United States Supreme Court had before it an international forum-selection clause that selected the London Court of Justice as the forum for dispute resolution.¹⁰ The Supreme Court was unmoved by the argument that English courts might enforce an exculpatory clause in the contract of towage and the defendant might therefore be relieved of liability for its own wrongdoing.¹¹ In rejecting this concern as a basis for invalidating the forum-selection clause, the Court said it was not "dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum."¹² The Supreme Court explained that in an agreement between Americans regarding essentially local disputes, "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the forum might suggest that the agreement was an adhesive one."¹³ But the Supreme Court emphasized, "[Y]et even there the party claiming [the agreement should not be enforced] should bear a heavy burden of proof."¹⁴ The

Supreme Court observed that inconvenience in litigating in the chosen forum may be foreseeable at the time of contracting, and when that is the case, “it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”¹⁵

Dreyfus has not made such a showing. It was certainly foreseeable that Louis Dreyfus Corporation's subsidiaries, wherever located, would be required to litigate in New York under the policy's provisions. Dreyfus has not shown that litigating in New York would essentially deprive it of its day in court. Furthermore, the Supreme Court “refine[d] the analysis of *The Bremen*” in *Carnival Cruise Lines, Inc.*¹⁶ In the latter case, a passenger sustained personal injuries during a cruise and sued in the State of Washington. A forum-selection clause was included in her printed ticket that selected Florida as the location of any litigation “‘arising under, in connection with or incident to’” the contract.¹⁷ The Supreme Court noted that “a cruise ship typically carries passengers from many locales.”¹⁸ A forum-selection clause, the Court concluded, “has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.”¹⁹ This benefited passengers, the Court observed, “in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”²⁰ Florida was not “a ‘remote alien forum’” the Supreme *114 Court concluded.²¹ The Court continued, “It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.”²² There was “no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims.”²³ Nor was there any “evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching,” and the passenger “presumably retained the option of rejecting the contract with impunity.”²⁴

In the present case, the State of New York is not a “‘remote alien forum.’”²⁵ There is no indication that AIU or Dreyfus

chose New York as a means of discouraging claims. Nor is there any evidence of fraud or overreaching.

With regard to the Insurance Code, we need not decide the extent to which article 21.42 or former article 21.43, section 9 govern the insurance contract at issue. Neither requires suit to be brought or maintained in Texas.²⁶

[2] Finally, we turn to Dreyfus's arguments that insurance proceeds will benefit Texans or Texas businesses and therefore the case should be tried in Hidalgo County. Not only does this “reflect[] something of a provincial attitude regarding the fairness of other tribunals,” a notion rejected by the United States Supreme Court in *The Bremen*,²⁷ Dreyfus's argument blatantly suggests that the tribunal should consider, consciously or unconsciously, the benefits to the local community in deciding whether there is insurance coverage. This is highly offensive to a system of justice based on the rule of law and gives fodder to those who have in the past questioned the fairness of Texas courts. We categorically reject Dreyfus's arguments.

The forum-selection clause at issue is enforceable. To the extent the trial court concluded otherwise, it clearly abused its *115 discretion. We turn to whether the clause should be enforced by mandamus.

III

[3] Dreyfus contends that AIU has an adequate remedy by appeal and therefore mandamus relief is unavailable. We disagree.

We have consistently granted mandamus relief to enforce another type of forum-selection clause, an arbitration agreement,²⁸ if the agreement to arbitrate is not governed by the Texas Arbitration Act.²⁹ The Texas Arbitration Act grants the right to an interlocutory appeal if a trial court denies a motion to compel arbitration,³⁰ but that right does not encompass arbitration agreements that are subject to the Federal Arbitration Act or other jurisdictions' statutory schemes.³¹ We held in *Jack B. Anglin Co., Inc. v. Tips* that mandamus relief should be granted to enforce arbitration agreements to which the Federal Arbitration Act applied,³² and in *In re J.D. Edwards World Solutions* that mandamus should be granted when another state's arbitration statute

applied.³³ We recognized in *Tipps* that “mandamus relief will not issue merely because an appellate remedy may be more expensive and time-consuming than mandamus,” but that “it *will* issue when the failure to do so would vitiate and render illusory the subject matter of an appeal.”³⁴ We concluded that failing to enforce a contractual agreement to arbitrate would “vitiate and render illusory the subject matter of an appeal.”³⁵

Dreyfus contends that we should treat a forum-selection clause requiring litigation to be brought in another state differently from arbitration agreements. It argues that requiring the parties to proceed to trial in Texas and then enforcing the forum-selection clause on appeal does not make an appellate remedy inadequate. Dreyfus additionally contends that AIU might prevail in a trial in Texas and that the mere possibility of a waste of judicial resources if AIU does not prevail would not render an appellate remedy inadequate.

But the same considerations were present in *Tipps*. We could have required the parties to go forward with a trial and then enforced the arbitration clause if Anglin had lost and pursued its arbitration rights on appeal. Anglin presumably could also have proceeded with a breach of *116 contract action against the party who had resisted arbitration to recover the costs of trial and appeal. But these considerations did not deter us from concluding that an appeal following a trial would be an inadequate remedy. These same considerations are present when there is an agreement to pursue litigation in a forum other than Texas. We see no meaningful distinction between this type of forum-selection clause and arbitration clauses.

Dreyfus cites the seminal decision in *Walker v. Packer*³⁶ for the proposition that “mere” additional cost and delay will not render an appellate remedy inadequate. But such a characterization gives *Walker v. Packer* and its principles short shrift. The Court had before it a discovery dispute. The plaintiffs were seeking discovery from the defendant, which the trial court refused to compel. This Court refused to grant mandamus relief. Much of the discussion in *Walker v. Packer* regarding an inadequate remedy by appeal centers around discovery issues. The Court said, “The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today. No mandamus case has ever rejected this requirement, or offered any explanation as to why mandamus review of discovery orders should be exempt from this ‘fundamental tenet’ of mandamus

practice.”³⁷ The Court recognized that discovery rulings were truly “‘incidental’” pre-trial rulings,³⁸ and without the no-adequate-remedy-by-appeal limitation, “mandamus ‘would soon cease to be an extraordinary writ.’ ”³⁹ The Court continued, “We thus hold that a party seeking review of a discovery order by mandamus must demonstrate that the remedy offered by an ordinary appeal is inadequate.”⁴⁰ With regard to whether mandamus should issue “whenever an appeal would arguably involve more cost or delay,” this Court said that such a rule would be “unworkable, both for individual cases and for the system as a whole.”⁴¹ The Court reasoned, “It follows that the system cannot afford immediate review of *every* discovery order *in general*.”⁴² The Court then disapproved of authorities “to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.”⁴³

But even with regard to discovery rulings, *Walker v. Packer* recognized that there were instances in which appellate courts should not await the outcome of a trial on the merits to remedy a trial court’s abuse of discretion. Among these were instances in which a trial court compels “patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party.”⁴⁴ The Court cited as an example *General Motors Corp. v. Lawrence*⁴⁵ in which there was a “demand for information about all vehicles for all years.”⁴⁶ *117 Such abuses could be remedied on appeal by a determination that the discovery was too broad and that the producing party was entitled to recover all its costs including the cost of production and attorney’s fees. Or, in *In re Colonial Pipeline*, an appellate court could have remedied the trial court’s requirement that a party create a document inventory by ordering the requesting party to pay all costs associated with creating that inventory. But this Court deemed such a remedy inadequate.⁴⁷ “Mere” additional cost and delay in waiting to resolve the issue on appeal was irrelevant. We have since granted mandamus relief in many instances to remedy overly broad discovery.⁴⁸ Clear harassment will not be tolerated under *Walker v. Packer*, and we have not wavered from that principle.

[4] Subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights

granted in a forum-selection clause is clear harassment. There is no benefit to either the individual case or the judicial system as a whole. The only benefit from breach of a forum-selection clause inures to the breaching party. That party hopes that its adversary will weary or avoid the cost of protracted litigation and settle when it would not otherwise have done so. Likewise, in comparing the respective burdens on the parties,⁴⁹ the burden on a party seeking to enforce a forum-selection clause of participating in a trial then appealing to vindicate its contractual right is great while there is no legitimate benefit whatsoever to the party who breached the forum-selection agreement.

We granted mandamus relief when a trial court required a workers' compensation carrier to pay its insured's attorney's fees each month as the litigation of her claims proceeded against the carrier.⁵⁰ We acknowledged that on appeal, a court could order the return of the attorney's fees, even though the actual collection of such an award was problematic.⁵¹ We also observed that the carrier was not likely to exhaust its vast financial resources simply because it had to pay its adversary's attorney's fees.⁵² What made the appellate remedy inadequate was that the situation could exert additional pressure on the defendant to settle rather than defend the claim. We said, "Requiring a party to advance the litigation costs of the opposition in addition to its own expenses so skews the litigation process that any subsequent remedy by appeal is inadequate."⁵³ This was because the plaintiff would have "little incentive to resolve the dispute economically and efficiently, and may even be encouraged to deliberately protract the proceedings to encourage a *118 favorable settlement."⁵⁴ The same is true when a party refuses to abide by a forum-selection clause. By insisting that the case proceed in a forum other than that agreed upon, the breaching party is adding a layer of expense that would otherwise not exist, and the breaching party may be inclined to protract proceedings to encourage a favorable settlement.

This Court also said in  *Walker v. Packer* that mandamus should issue if a "party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error ... so that the trial would be a waste of judicial resources."⁵⁵ We further recognized that "one of the principal reasons that mandamus should be restricted" is to avoid "interlocutory appellate review of errors that, in the final analysis, will prove to be harmless."⁵⁶ When a trial court denies a motion to enforce a valid, enforceable

forum-selection clause that specifies another state or country as the chosen forum, the trial court's final judgment is subject to automatic reversal at the request of the party seeking enforcement of the clause. As the United States Supreme Court held in  *The Bremen*, "[t]he correct approach [is] to enforce the forum clause specifically."⁵⁷ Otherwise, courts would be guilty of the parochial and "provincial attitude"⁵⁸ that led jurists in another era to refuse to enforce forum-selection clauses. Thus, a trial in a forum other than that contractually agreed upon will be a meaningless waste of judicial resources. The error is not harmless.

We have acted to prevent a waste of judicial resources in contexts other than discovery disputes. For example, although we generally do not issue writs of mandamus to correct venue decisions unless a statute provides such a remedy, we granted mandamus when a trial court improperly transferred sixteen cases to sixteen different counties.⁵⁹ We have also granted mandamus to require a party to exhaust its administrative remedies before proceeding in a court of law.⁶⁰

We have enforced contractual agreements that substantively or procedurally affect proceedings in our courts. We granted mandamus relief to enforce an auto insurance policy provision requiring the insured and the insurer to submit to an appraisal process to determine the value of a vehicle when it is a total loss.⁶¹ Today, we have held in  *In re Prudential* that a contractual waiver of the right to a jury trial is enforceable by mandamus.⁶² In  *In re Wells Fargo Bank Minnesota N.A.* a court of appeals had also issued mandamus to enforce a contractual jury waiver.⁶³

As Dreyfus points out, this Court previously declined to grant petitions for review in two cases in which the petitioners *119 sought to enforce forum-selection clauses specifying states other than Texas as the location for dispute resolution.⁶⁴ But this Court's failure to grant a petition for writ of mandamus is not an adjudication of, nor even a comment on, the merits of a case in any respect, including whether mandamus relief was available.

We recognize there is some tension between our holding today and a few prior decisions of this Court concerning special appearances⁶⁵ and separate trials of damages and liability.⁶⁶ In  *Canadian Helicopters*, we held that a denial of a special appearance is not reviewable by mandamus unless

a trial court “act[s] with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay.”⁶⁷ A year later, we nevertheless reviewed a special appearance by mandamus when there were only bare allegations of conspiracy to support personal jurisdiction and there was a “‘total and inarguable absence of jurisdiction.’”⁶⁸ We subsequently issued mandamus when a trial court denied a special appearance and the defendant potentially faced thousands of similar claims.⁶⁹ More importantly, the Legislature has now rejected this Court's view, expressed in [Canadian Helicopters](#) and other cases, that interlocutory review of the grant or denial of a special appearance should not generally be available. The Legislature enacted [section 51.014\(a\)\(7\) of the Texas Civil Practice and Remedies Code](#), authorizing interlocutory appeals in such cases.⁷⁰

With regard to separate trials, we said in [Iley v. Hughes](#) that there was an adequate remedy by appeal and therefore declined to issue mandamus.⁷¹ But we did so only after reviewing the merits of the trial court's decision to try damages separately from liability and making it clear that this determination was error that would certainly be reversed on appeal.⁷² We said, “Our conclusion is that although the discretion lodged in trial judges by Rule 174(b) in ordering separate trials of ‘issues’ is indeed broad and realistic, it does not authorize separate trials of liability and damage issues in personal injury litigation.”⁷³ This Court effectively granted relief, since it was unlikely the trial court would proceed with separate trials in light of the Court's opinion.

Courts in other jurisdictions have enforced by mandamus forum-selection clauses similar to the one at issue.⁷⁴ A *120 Florida court has reversed a trial court's failure to enforce a forum-selection clause on interlocutory appeal, without explaining the basis for interlocutory jurisdiction.⁷⁵

We recognize that the United States Supreme Court ruled in [Lauro Lines S.R.L. v. Chasser](#)⁷⁶ that the denial of a motion to dismiss based on a forum-selection clause cannot be reviewed on interlocutory appeal under [28 U.S.C. § 1291](#) and the collateral order doctrine expressed in [Cohen v. Beneficial Industrial Loan Corp.](#)⁷⁷ The Supreme Court said that the right to be sued in another forum “while not perfectly secured by appeal after final judgment, is adequately

vindicable ... as a claim that the trial court lacked personal jurisdiction over the defendant.”⁷⁸ While we certainly respect the United States Supreme Court's reasoning, that court's conclusion is informative only, not binding, in the case before us. We note that the concurring opinion in [Lauro Lines](#) observed that the right to be sued in a contractually agreed upon forum “is not fully vindicated—indeed, to be utterly frank, [it] is positively destroyed—by permitting the trial to occur and reversing its outcome.”⁷⁹ The concurring opinion concluded that the United States Supreme Court deemed appellate review adequate because the contractual right to be sued in an agreed forum was not “*important enough* to be vindicated” by interlocutory appeal.⁸⁰ This Court has struck a somewhat different balance in determining whether an appeal affords an adequate remedy. For example, we have intervened in discovery matters within the confines of the parameters set forth in [Walker v. Packer](#), as discussed above, while it is an unusual occurrence for the United States Supreme Court to decide a discovery issue on interlocutory appeal. In addition, the federal court system has tools for interlocutory review that are unavailable in our state court system. A federal district court may certify a question to an appellate court under [28 U.S.C. 1292\(b\)](#). Further, we have been given guidance about the wisdom and desirability of interlocutory review from time to time by the Texas Legislature. To cite one instance, the Texas Legislature has determined as a policy matter that interlocutory appeal is available when personal jurisdiction is at issue in a special appearance,⁸¹ which is the opposite of the United States Supreme Court's view of whether an appeal adequately vindicates a challenge to personal jurisdiction.

Accordingly, we conclude that AIU does not have an adequate remedy by appeal.

IV

[5] Dreyfus contends that AIU waived reliance on the forum-selection clause by not raising the agreement sooner than it *121 did in the trial court. We disagree. AIU filed a motion to dismiss based on the forum-selection clause five months after Dreyfus filed suit. We have held that similar, and indeed far longer, delays are not a waiver of an arbitration clause,⁸² and there is no sound basis for applying a different rule to the genre of forum-selection clauses to which the Dreyfus/AIU agreement belongs. Dreyfus further contends

that it asserted its claims against AIU in demand letters more than a year before suit was filed, and AIU did not raise the forum-selection clause. Again, we rejected a similar argument in the arbitration context,⁸³ and we reject it here.

Dreyfus also asserts that AIU waived its right to rely on the forum-selection clause by requesting a jury trial, paying the jury fee and filing a general denial instead of a special appearance. In the arbitration context, we have consistently held that similar activities are not sufficient to waive an arbitration clause.⁸⁴ We likewise conclude that AIU's actions do not constitute a waiver of the forum-selection clause. Nor was AIU required to file a special appearance. It did not challenge the trial court's personal jurisdiction. It sought only to enforce its contractual right.

[6] Finally Dreyfus argues that in the court of appeals, AIU did not address Dreyfus's waiver or "public policy" arguments as to why the agreement should not be enforced. Regardless of whether this is the case, which we have not determined, a mandamus proceeding in this Court is an original proceeding, just as it is an original proceeding in the court of appeals. While it is certainly the better practice to present all arguments to a court of appeals before seeking mandamus in this Court, the failure to do so is not a failure to preserve error as it ordinarily would be in an appeal. AIU presented all its arguments to the trial court, and the trial court abused its discretion in denying the motion to dismiss. The proceeding before this Court is not directed at what the court of appeals did or did not do or how that court ruled.

* * * *

For the foregoing reasons, we conditionally grant a writ of mandamus directing the trial court to grant AIU's motion to dismiss.

Chief Justice PHILLIPS filed a dissenting opinion, in which Justice O'NEILL, Justice JEFFERSON and Justice SCHNEIDER joined.

Chief Justice PHILLIPS, joined by Justice O'NEILL, Justice JEFFERSON, and Justice SCHNEIDER, dissenting.

Because mandamus is an extraordinary remedy which undermines the normal appellate *122 process, courts

reserve its use for very special circumstances.  *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). The writ issues when necessary to "correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law."  *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

The Court reasons that we should grant mandamus relief here to enforce this forum selection clause because we routinely grant mandamus relief to enforce arbitration agreements not governed by the Texas Arbitration Act, which the Court characterizes as just "another type of forum selection clause." 148 S.W.3d at 115. But there are important differences between arbitration agreements governed by federal law and forum selection clauses. While Texas public policy has always encouraged arbitration, it has not always favored the forum selection clause.

The right to arbitration has been guaranteed in every Texas constitution.¹ See Tex. Const. art. XVI, § 13 (repealed 1969); Tex. Const. of 1869, art. XII, § 11; Tex. Const. of 1866, art. VII, § 15; Tex. Const. of 1861, art. VII, § 15; Tex. Const. of 1845, art. VII, § 15. Forum selection clauses, on the other hand, were initially disfavored by American courts because they were perceived to tamper with or "oust" a court's rightful jurisdiction. See Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R.4th 404, 409–14 (1984); R.D. Hursh, Annotation,  *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 56 A.L.R.2d 300, 306–320 (1957). Under this "ouster doctrine," forum selection clauses were often described as void on public policy grounds. As the Supreme Court said in  *Ins. Co. v. Morse*:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in  *Cancemi's [v. People] Case*, 18 New York 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal

tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled.*He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*

That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that *agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.*

*123  *Morse*, 87 U.S. (20 Wall.) 445, 451, 22 L.Ed. 365 (1874) (emphasis added) (citations omitted). Twenty years before that, the Massachusetts Supreme Court explained the “ouster doctrine” in the following oft-quoted passage:

The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience.

Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856). This Court applied the “ouster doctrine” in 1919 to reject enforcement of a forum selection provision in an insurance contract which attempted to fix venue for suits against an insurance company in Dallas County.  *Int'l Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S.W. 630, 631 (1919).

Incorporating quotes from  *Morse* and *Nute*, this Court concluded that such a clause was “utterly against public policy.”  *Id.* at 632. We subsequently followed

 *International Travelers* to hold that parties could not contract to avoid a mandatory venue statute.  *Leonard v. Paxson*, 654 S.W.2d 440, 441–42 (Tex.1983);  *Fid. Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 536 (Tex.1972); see also *Ziegelmeyer v. Pelphrey*, 133 Tex. 73, 125 S.W.2d 1038, 1040 (1939) (“venue is fixed by law and

any [agreement] to change the law with reference thereto is void”). Based on these decisions, at least one court has concluded that Texas “treats forum-selection clauses as unenforceable per se.”  *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497, 497 n. 3 (Mo.1992).

Forum selection clauses have gained much wider acceptance since the Supreme Court replaced the “ouster doctrine” with a more favorable view of them as a relevant commercial tool.

The  *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Moreover, a number of Texas intermediate appellate courts have joined this trend, ² *International Travelers* notwithstanding. See James T. Brittain, Jr., *A Practitioner's Guide to Forum Selection Clauses in Texas*, 1 Hous. Bus. & Tax L.J. 79, 89–99 (2001).

But even were I to agree that the forum selection clause is now presumptively valid in Texas and that the trial court abused its discretion in failing to apply the parties' agreement in the underlying case, it does not follow that mandamus relief is appropriate. As a rule, we do not specifically enforce contractual rights by mandamus. We have done so in arbitration cases not just because it effectuated the parties' agreement, but because of other special circumstances. In

 *Jack B. Anglin Co. v. Tipps*, we identified the procedural anomaly that permitted an interlocutory appeal from the denial of arbitration under the state act, but not the federal act.  842 S.W.2d 266, 272 (Tex.1992); see also  *In re Prudential*, 148 S.W.3d 124, 141 (Tex.2004) (Phillips, C.J. dissenting) (discussing arbitration mandamus cases).

The Court suggests that we must grant mandamus relief here to conserve judicial resources, concluding that any trial in Texas will be a waste of time and money. But *124 the cost or delay of having to go through a trial and an appeal to correct an error does not make the remedy at law inadequate.

 *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex.1991). Instead, the relator must show that the trial court's ruling will “permanently deprive [it] of substantial rights.”

 *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex.1995) (per curiam). The law provides remedies other than mandamus to assure that contracting parties receive the benefit of their bargains. Thus, it is not inevitable that AIU will suffer irreparable loss if we do not intervene at this stage of the litigation. The United States Supreme Court has expressed a similar view, holding that a party's

rights under a forum selection clause are not destroyed if vindication is postponed until a final, appealable judgment is rendered in the case. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 501, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989). Justice Scalia, concurring separately, explained that a party's right to the immediate enforcement of a forum selection clause was simply not as important as the policy reasons for circumscribing interlocutory appeals:

While it is true, therefore, that the "right not to be sued elsewhere than in [the selected forum]" is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals.

Id. at 502–03, 109 S.Ct. 1976.

Nor do I believe that our action today, if indicative of things to come, will save judicial resources over the long term. The writ of mandamus should not be an alternative to appeal, available whenever an appellate court decides

that trial court errors demanded swift correction. *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex.1990) (per curiam); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex.1969). It instead should be an extraordinary remedy reserved to correct clear errors for which no other adequate remedy exists. See *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d at 916, 917 (Tex.1985). A disciplined adherence to this latter limitation has generally been thought necessary to preserve "orderly" trial proceedings and to prevent the "constant interruption of the trial process by appellate courts." *Pope*, 445 S.W.2d at 954.

The law clearly provides a remedy other than mandamus to assure that contracting parties receive the benefit of their bargains. Because AIU has not shown that this remedy is inadequate, as that term has been generally understood in this state, I would deny the writ.

All Citations

148 S.W.3d 109, 47 Tex. Sup. Ct. J. 1093

Footnotes

- 1 See generally *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).
- 2 *Id.* at 13, 92 S.Ct. 1907.
- 3 *Id.* at 12, 92 S.Ct. 1907.
- 4 499 U.S. 585, 595–96, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).
- 5 *My Cafe–CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 865–67 (Tex.App.-Dallas 2003, no pet.); *CMS Partners, Ltd. v. Plumrose USA, Inc.*, 101 S.W.3d 730, 734–36 (Tex.App.-Texarkana 2003, no pet.); *Holeman v. Nat'l Bus. Inst., Inc.*, 94 S.W.3d 91, 101–03 (Tex.App.-Houston [14th Dist.] 2002, pet. denied); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203–05 (Tex.App.-Eastland 2001, pet. denied); *Abacan Technical Servs. Ltd. v. Global Marine Int'l Servs. Corp.*, 994 S.W.2d 839, 843–45 (Tex.App.-Houston [1st Dist.] 1999, no pet.); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 71–75 (Tex.App.-Dallas 1996, no writ); *Barnette v. United Research Co.*, 823 S.W.2d 368, 370 (Tex.App.-Dallas 1991, writ denied); *Bellair, Inc. v. Aviall of Tex., Inc.*, 819 S.W.2d 895, 898 (Tex.App.-Dallas 1991, writ denied). But see *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 234 (Tex.App.-Houston [14th Dist.] 1999, pet. denied) (refusing to enforce a forum-selection clause, concluding that it was "fundamentally unfair").

6 See  *id.*

7  407 U.S. at 15, 92 S.Ct. 1907.

8  *Id.* at 15–17, 92 S.Ct. 1907.

9 TEX. INS. CODE art. 21.42; Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, 1951 Tex. Gen. Laws 868, 1091 (amended 1959) (amended 1963) (amended 1983), *amended and renumbered by* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, § 18.04, 1993 Tex. Gen. Laws 2559, 2691 (former  Tex. Ins. Code art. 21.43, § 9), repealed by Act of May 22, 2001, 77th Leg., R.S., ch. 1419, § 31(a), 2001 Tex. Gen. Laws 3658, 4208.

10  407 U.S. at 2, 92 S.Ct. 1907.

11  *Id.* at 15, 92 S.Ct. 1907.

12  *Id.* at 17, 92 S.Ct. 1907.

13  *Id.*

14  *Id.*

15  *Id.* at 18, 92 S.Ct. 1907.

16  499 U.S. 585, 593, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) (emphasis added).

17  *Id.* at 587, 111 S.Ct. 1522.

18  *Id.* at 593, 111 S.Ct. 1522.

19  *Id.* at 593–94, 111 S.Ct. 1522.

20  *Id.* at 594, 111 S.Ct. 1522.

21  *Id.* (quoting  *Bremen*, 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)).

22  *Id.* at 595, 111 S.Ct. 1522.

23  *Id.*

24  *Id.*

25  *Id.* at 594, 111 S.Ct. 1522 (quoting  *Bremen*, 407 U.S. at 17, 92 S.Ct. 1907).

26 Former  article 21.43, section 9 said:

 **Sec. 9. TEXAS LAW DEEMED ACCEPTED.** The provisions of this code are conditions on which foreign or alien insurance corporations are permitted to do the business of insurance in this state, and any of the foreign or alien corporations engaged in issuing contracts or policies in this state are deemed to have agreed to fully comply with these provisions as a prerequisite to the right to engage in business in this state.

Act of May 30, 1993, 73rd Leg., R.S., ch. 685, § 18.04, 1993 Tex. Gen. Laws 2559, 2691, *amending and renumbering* Act of June 7, 1951, 52nd Leg., R.S., ch. 491, § 1, 1951 Tex. Gen. Laws 868, 1091 (amended 1959) (amended 1963) (amended 1983) (repealed 2001).

Article 21.42 provides:

Art. 21.42. Texas Laws Govern Policies

Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

TEX. INS. CODE art. 21.42.

- 27 407 U.S. at 12, 92 S.Ct. 1907.
- 28 "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (observing that arbitration provisions are a subset of forum-selection clauses).
- 29 See, e.g., *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 551 (Tex.2002); *In re L & L Kempwood Assoc., L.P.*, 9 S.W.3d 125, 128 (Tex.1999); *In re La. Pac. Corp.*, 972 S.W.2d 63, 65 (Tex.1998); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex.1995).

- 30 TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1).
- 31 See generally *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d at 551 (holding that under the Texas Arbitration Act "a party is entitled to an interlocutory appeal from an order denying an application to compel arbitration only if it is 'made under Section 171.021[of the TAA.]'" and that the "TAA does not authorize an interlocutory appeal when the subject arbitration agreement is governed by Colorado law or the [Uniform Arbitration Act]").

- 32 842 S.W.2d 266, 272–73 (Tex.1992).

- 33 See *87 S.W.3d* at 551.

- 34 842 S.W.2d at 272 (emphasis added).

- 35 *Id.*

- 36 827 S.W.2d 833 (Tex.1992).

- 37 *Id.* at 842.

- 38 *Id.* (quoting *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex.1991)).

- 39 *Id.* (quoting *Braden*, 811 S.W.2d at 928).

- 40 *Id.*

- 41 *Id.*

- 42 *Id.* (emphasis added).

- 43 *Id.*

- 44 *Id.* at 843.

- 45 651 S.W.2d 732 (Tex.1983).

- 46 *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex.1992).

- 47 *In re Colonial Pipeline*, 968 S.W.2d 938, 942–43 (Tex.1998).

- 48 See, e.g., *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex.2003); *In re Am. Optical Corp.*, 988 S.W.2d 711, 713–14 (Tex.1998); *In re Colonial Pipeline Co.*, 968 S.W.2d at 942–43; *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex.1996); *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex.1995); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex.1995).

- 49 See *Walker*, 827 S.W.2d at 843 (concluding that mandamus relief would issue when a discovery request "imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party").

- 50 *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 595 (Tex.1996).

51 *Id.* at 594.

52 *Id.* at 595 ("While the trial court's error in this case does not affect Travelers' ability to present the substance of its defense, it radically skews the procedural dynamics of the case.").

53 *Id.*

54 *Id.*

55 *Walker*, 827 S.W.2d at 843; see also *Gen. Motors Corp. v. Tanner*, 892 S.W.2d 862, 864 (Tex.1995) (granting mandamus relief when a plaintiff refused to allow inspection of a part that was alleged to be defective and to have caused the accident).

56 *Walker*, 827 S.W.2d at 843.

57 The *Bremen*, 407 U.S. at 15, 92 S.Ct. 1907.

58 *Id.* at 12, 92 S.Ct. 1907.

59 *In re Masonite Corp.*, 997 S.W.2d 194, 198–99 (Tex.1999).

60 *Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex.1993).

61 *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex.2002).

62 148 S.W.3d 124 (Tex.2004).

63 115 S.W.3d 600, 611–12 (Tex.App.-Houston [14th Dist.] 2003, orig. proceeding [mand. denied]).

64 See *In re GNC Franchising, Inc.*, 22 S.W.3d 929, 932 (Tex.2000) (Hecht, J., dissenting from denial of petitions).

65 See, e.g., *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304 (Tex.1994).

66 *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648 (1958).

67 *Canadian Helicopters*, 876 S.W.2d at 308–09.

68 *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 776 (Tex.1995) (quoting *Canadian Helicopters*, 876 S.W.2d at 309).

69 *CSR Ltd. v. Link*, 925 S.W.2d 591, 596–97 (Tex.1996).

70 TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7).

71 *Iley*, 311 S.W.2d at 651–52.

72 *Id.*

73 *Id.* at 651.

74 *Ex parte Procom Servs., Inc.*, 884 So.2d 827, 831, 2003 WL 23027621 (Ala.2003); *State ex rel. J.C. Penney Corp. v. Schroeder*, 108 S.W.3d 112, 114 (Mo.Ct.App.2003); *Ex parte D.M. White Constr. Co.*, 806 So.2d 370, 374 (Ala.2001); *Ex parte N. Capital Res. Corp.*, 751 So.2d 12, 15 (Ala.1999); *Furda v. Superior Court*, 161 Cal.App.3d 418, 427, 207 Cal.Rptr. 646 (Cal.App.1984); see also *Ex parte CTB, Inc.*, 782 So.2d 188, 190–92 (Ala.2000) (stating that mandamus was the proper mechanism for obtaining review of a court's failure to enforce a forum-selection clause, but construing the clause as non-exclusive).

75 *Southwall Techs., Inc. v. Hurricane Glass Shield*, 846 So.2d 669, 670 (Fla.App.2003); see also *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C.App. 286, 502 S.E.2d 415, 419 (1998) (reversing a trial court's failure to enforce forum-selection clause on interlocutory appeal).

76 490 U.S. 495, 501, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

- 77 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
- 78 490 U.S. at 501, 109 S.Ct. 1976.
- 79 *Id.* at 502–03, 109 S.Ct. 1976 (Scalia, J., concurring).
- 80 *Id.* at 502, 109 S.Ct. 1976.
- 81 TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7).
- 82 *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex.2002); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705–06 (Tex.1998); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex.1996); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898–99 (Tex.1995).
- 83 *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex.1999) (holding that party's failure to initiate arbitration in response to letters requesting arbitration hearing did not waive right to arbitrate).
- 84 See, e.g., *In re Bruce Terminix*, 988 S.W.2d at 704–05 (holding that filing an answer and propounding a set of eighteen interrogatories and a set of nineteen requests for production did not waive arbitration rights); *Mancias*, 934 S.W.2d at 90 (holding that filing of answer, sending interrogatories and requests for production, noticing depositions, participating in a court-ordered docket control conference, and entering into an agreement to set case for later date did not constitute a waiver of a contractual right to arbitration); see also *Marshall*, 909 S.W.2d at 898–99 (holding that even substantially invoking the judicial process does not waive a party's arbitration rights unless the opposing party proves it suffered prejudice as a result).
- 1 Each constitution provided that it is “the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial.” TEX. CONST. 1876, art. XVI, § 13 (repealed 1969). This section was repealed by the voters in 1969 as one of the “obsolete, superfluous and unnecessary sections of the Constitution.” Tex. H.J.R. No.3, 61st Leg., R.S., 1969 Tex. Gen. Laws 3230. The House Joint Resolution stated that the repealer was not intended to “make any substantive changes in our present constitution.” *Id.*
- 2 This trend to enforce forum selection clauses has not been without its detractors. See, e.g., David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1095, 1161 (2002) (noting that THE BREMEN was a “sea-change in the way private agreement is viewed in relation to procedure” and describing the judicially created doctrine for enforcement of forum selection clauses as a “mess”).

Exhibit 10

2015 WL 1882267

Only the Westlaw citation is currently available.

**SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.**

Court of Appeals of Texas, Austin.

TWENTY FIRST CENTURY HOLDINGS, INC.
d/b/a [American Geothermal Systems, Inc.](#);
[Victor DeMarco](#); and N. West Short, Appellants

v.

PRECISION GEOTHERMAL
DRILLING, L.L.C., Appellee

NO. 03-13-00081-CV

|

Filed: April 23, 2015

**FROM THE COUNTY COURT AT LAW NO.
2 OF TRAVIS COUNTY, NO. C-1-CV-12-12503,
HONORABLE ERIC SHEPPERD, JUDGE PRESIDING**

Attorneys and Law Firms

[Christopher D. Osborn](#), Osborn Law Firm PC, Taylor, TX,
[Tracia Y. Lee](#), [Tracia Y. Lee](#), PLLC, Austin, TX, [N. West Short](#), West Short & Associates, P.C., Georgetown, TX, for
Appellant.

[Jason W. Snell](#), [Kimberly D. Culver](#), Andrea Bergia, The
Snell Law Firm, P.L.L.C., Austin, TX, for Appellee.

Before Chief Justice [Rose](#), Justices [Puryear](#) and [Goodwin](#)

MEMORANDUM OPINION

[Melissa Goodwin](#), Justice

*1 In this interlocutory appeal, Twenty First Century Holdings, Inc. d/b/a American Geothermal Systems, Inc. (AGSI); Victor DeMarco; and N. West Short appeal the county court's denial of their Petition for Writ of Mandamus and Interlocutory Appeal. In the petition, appellants sought a writ of mandamus compelling the justice court to rescind its order vacating dismissal of the suit, to vacate its sanctions award, and to order arbitration and, in the alternative, sought interlocutory appeal of the justice court's order denying the

motion to compel arbitration. For the reasons that follow we affirm in part and dismiss in part for want of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

AGSI is a geothermal HVAC company owned by DeMarco.¹ DeMarco formed a drilling company named Precision Geothermal Drilling (PGD) with Patricia Denny to perform drilling work for companies like AGSI. PGD was formed as a limited liability company (LLC), with Denny as 51% owner, DeMarco as 49% owner, and both as managers. See generally Tex. Civ. Prac. & Rem. Code §§ 101.001–.621 (governing limited liability companies). AGSI contracted with PGD for its drilling work, and disputes soon arose between DeMarco and Denny over the drilling work and payment. Denny filed suit in justice court on behalf of PGD for breach of contract against AGSI seeking to recover approximately \$8,000.00.² DeMarco filed an answer on behalf of AGSI. A trial was held, and the justice court granted judgment for PGD. AGSI filed a motion for new trial, which was granted.

The parties subsequently reached a settlement agreement in principle, which included mutual releases and called for AGSI to pay PGD \$5,100. During negotiations over the final details of the settlement, a dispute arose between Denny and DeMarco over the operation of PGD, and DeMarco accused Denny of unauthorized acts. DeMarco requested certain records from Denny, some of which she withheld pending his agreement to release his personal claims against her. Based on the records Denny did provide to DeMarco, DeMarco concluded she had mishandled the business and engaged in self-dealing. When DeMarco continued to refuse to release his personal claims against Denny in the settlement agreement, Denny set the case for trial. Prior to trial, DeMarco or Short, AGSI's counsel, drafted a settlement agreement releasing all claims against both companies and DeMarco, and DeMarco signed it on behalf of both companies and himself and filed a nonsuit on behalf of PGD. The settlement agreement included a clause providing that any disputes arising out of the settlement agreement "shall be first submitted to mediation ... [and] in the event such mediation is unsuccessful ... the dispute shall be settled by binding arbitration." Both the settlement agreement and the nonsuit were signed by DeMarco only, and not by Short, although the record reflects that Short represented DeMarco in virtually all other matters related to this dispute and suit.

*² PGD filed a motion to set aside the nonsuit or in the alternative motion for new trial, and the justice court vacated the dismissal it had entered after DeMarco filed the nonsuit. PGD subsequently filed a motion to show authority and for sanctions, stating it had reason to believe Short had drafted the settlement agreement and nonsuit, which was groundless, and instructed DeMarco to sign and file them. The motion sought to have Short show his authority to act on behalf of PGD when PGD was represented by other counsel and sought sanctions against both DeMarco and Short. AGSI responded to the motion, attempted to initiate arbitration, filed a letter to that effect in the justice court, and sought dismissal so that the arbitration could proceed. In denying AGSI's motion for arbitration, the justice court stated that the settlement agreement was not valid and any arbitration clause would be ineffective. The justice court also ordered DeMarco and Short each to pay \$3,000 in sanctions "for their involvement in filing a nonsuit with prejudice of this lawsuit when they were principal and counsel for the Defendant respectively." AGSI filed a Petition for Writ of Mandamus and Interlocutory Appeal with the county court, seeking mandamus relief compelling the justice court to rescind the order awarding sanctions, enter an order of nonsuit, and order arbitration or, in the alternative, seeking interlocutory appeal of the justice court's order denying the motion to compel arbitration. The county court denied the petition, and this appeal followed.³

DISCUSSION

As an initial matter, we address the nature of this case. Although appellants style this case as an appeal and seek interlocutory review of the county court's ruling on AGSI's motion to compel arbitration, they also challenge the county court's denial of mandamus relief and ask us to "mandamus the County Court at Law" and order it to vacate the orders entered by the justice court vacating the dismissal, denying AGSI's motion to compel arbitration, and awarding sanctions. Thus, appellants seek interlocutory appeal and, in the alternative, mandamus relief as to the county court's ruling on arbitration and mandamus relief only as to the county court's rulings on vacation of the dismissal and sanctions. We will separately address the interlocutory appeal and the request for mandamus relief. See  *CMH Homes v. Perez*, 340 S.W.3d 444, 452–54 (Tex. 2011) (explaining procedural and policy reasons why court may address both interlocutory appeal and alternative petition for mandamus raised in same filing styled as appeal without requiring

appellant to file separate document with title "petition for writ of mandamus"); *Watkins v. Jones*, 192 S.W.3d 672, 673–75 (Tex. App.—Corpus Christi 2006, orig. proceeding) (where party filed joint petition for writ of mandamus and interlocutory appeal, court addressed both requests for relief, dismissing interlocutory appeal for want of jurisdiction and denying mandamus relief); see also *In re Valero Energy Corp.*, 968 S.W.2d 916, 916–17 (Tex. 1998) (per curiam) (better course of action for court of appeals when confronted with parallel interlocutory appeal and mandamus proceeding is to consolidate and dispose of both simultaneously to conserve judicial resources).

Interlocutory Jurisdiction

We first address our jurisdiction over the county court's interlocutory ruling concerning arbitration. Generally, we have jurisdiction over final judgments rendered by a county court in a matter originating in justice court. See  *Tex. Gov't Code* §§ 22.220(a) (appellate court has jurisdiction over civil cases within its district of which county court has jurisdiction), 28.052 (repealed) (final judgment in justice court may be appealed to county court in manner provided by law for appeal from justice court to county court), 28.053(d) (repealed) (giving courts of appeal jurisdiction to consider appeals from de novo trials in county court on claims originating in justice court).⁴ Further, a denial of a motion to compel arbitration is subject to interlocutory appeal. See *Tex. Civ. Prac. & Rem. Code* §§ 51.016 (in matter subject to Federal Arbitration Act, appeal may be taken to court of appeals from interlocutory order of county court at law under same circumstances as allowed under 9 U.S.C. section 16, which includes order denying petition to order arbitration); 171.098 (under Texas Arbitration Act, party may appeal interlocutory order denying arbitration in same manner and to same extent as appeal from order or judgment in civil action);  *CMH Homes*, 340 S.W.3d at 448–49 (explaining that legislature amended TAA, which already allowed interlocutory appeal of order denying arbitration, to also allow interlocutory appeal of same under FAA).⁵ Although the validity of the settlement agreement is in question here, "whether the parties have entered into a binding agreement to arbitrate is one of the inquiries we undertake in an interlocutory appeal of the denial of a motion to compel arbitration."  *Weekly Homes, L.P. v. Rao*, 336 S.W.3d 413, 418 (Tex. App.—Dallas 2011, pet. denied). Therefore, we conclude that we have jurisdiction over the county court's interlocutory order refusing to compel arbitration. See

Tex. Civ. Prac. & Rem. Code §§ 51.016, 171.098; Tex. Gov't Code §§ 22.220(a), 28.052 (repealed), 28.053(d) (repealed). We turn then to the merits of appellants' first issue.

Interlocutory Appeal of Denial of Motion to Compel Arbitration

*3 In their first issue, appellants seek interlocutory appeal of the county court's refusal to compel arbitration pursuant to the settlement agreement. They contend that DeMarco had authority to execute the settlement agreement, the arbitration provision in the settlement agreement was therefore valid, and the county court abused its discretion in not compelling arbitration. PGD disputes DeMarco's authority to execute the agreement and the validity of the settlement agreement and argues that the county court did not abuse its discretion.

Standard of Review

We review a denial of a motion to compel arbitration for an abuse of discretion. *In re Labatt Food Serv., L.P.*, 279

S.W.3d 640, 642–43 (Tex. 2009); *Weekly Homes*, 336 S.W.3d at 418. Under this standard we defer to the trial court's factual determinations if they are supported in the evidence but review the trial court's legal determinations de novo.

Rachal v. Reitz, 403 S.W.3d 840, 843 (Tex. 2013); *In re Labatt Food Serv.*, 279 S.W.3d at 643; *Weekly Homes*, 336 S.W.3d at 418. “Although there is a strong presumption favoring arbitration, that presumption arises only after the party seeking to compel arbitration proves a valid arbitration agreement exists.” *VSR Fin. Servs. v. McLendon*, 409 S.W.3d 817, 827 (Tex. App.—Dallas 2013, no pet.). Whether a valid arbitration agreement exists is a question we review de novo. *Rachal*, 403 S.W.3d at 843; *In re Labatt Food Serv.*, 279 S.W.3d at 643.

This issue also involves matters of statutory construction, which is a question of law that we review de novo. See *Texas Mun. Power Agency v. Public Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Our primary concern is the express statutory language. See *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We apply the plain meaning of the text unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to

absurd results. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010).

Analysis

Appellants contend that DeMarco, as a manager of PGD, had authority to act on behalf of PGD in drafting and signing the settlement agreement that included the arbitration provision.

They cite **Business Organizations Code section 101.251**, which provides that managers of an LLC are its “governing authority,” and section 101.254, which provides that each governing person vested with actual or apparent authority by the governing authority is an agent of company for purposes of carrying out the company's business. See **Tex. Bus. Orgs. Code §§ 101.251**, .254. Because DeMarco was a manager of PGD, appellants argue, he had authority to sign the settlement agreement on behalf of PGD, as well as on behalf of AGSI and himself individually, and the arbitration provision in the settlement agreement is enforceable and binding.

PGD argues that DeMarco's actions are controlled by **section 101.255 of the Business Organizations Code**. See *id.* § **101.255** (“Contracts or Transactions Involving Interested Governing Persons”). **Section 101.255** provides, in relevant part, that an otherwise valid and enforceable contract or transaction between an LLC and a governing person or an entity in which a governing person is a managerial official or has a financial interest “is valid and enforceable, and is not void or voidable” if it is (1) known by or disclosed to and authorized by the “governing authority,” i.e., the managers, or (2) fair to the company. See *id.* § **101.255(a), (b)(1)(A), (b)(2)**. PGD contends that DeMarco, as the sole owner of AGSI, is an “interested governing person” under **section 101.255** and, consequently, the settlement agreement between AGSI and PGD had to be (1) known by or disclosed to and authorized by the managers, which included Denny, or (2) fair to PGD. PGD contends, and DeMarco does not dispute, that DeMarco entered the settlement agreement without informing Denny and that Denny did not otherwise know of the agreement. PGD also contends that on its face, the settlement agreement is not fair to PGD because it settles PGD's breach of contract claim for no payment of money, when the prior settlement agreement had called for payment of \$5,100 to PGD. Thus, PGD argues, the settlement agreement fails to meet either condition.

*4 We agree with PGD that the settlement agreement, in which the arbitration provision was embedded, did not meet either of the requirements under section 101.255. As the sole owner of AGSI, DeMarco was a managerial official with a financial interest and thus was an “interested governing person” under the plain language of section 101.255. See *id.* § 101.255(a)(2); *Marks*, 319 S.W.3d at 663. It is undisputed that in drafting and signing the settlement agreement, and including an arbitration provision, DeMarco acted independently, without consulting or even informing Denny. Thus, it is undisputed that the “managers” of PGD were not aware of the agreement. See *id.* § 101.255(b)(1)(A). Further, unbeknownst to Denny, the settlement agreement released PGD’s claims against AGSI and DeMarco in return for no consideration other than AGSI’s release of claims against PGD, despite a prior offer of \$5,100. Thus, the settlement agreement, with the arbitration clause, cannot be construed as “fair” to PGD applying the plain meaning of the term. See *id.* § 101.255(b)(2); *Webster’s Third New Int’l Dictionary* 815 (2002) (defining “fair” as “characterized by honesty and justice” or “free from fraud, injustice, prejudice, or favoritism”). On this record, we cannot conclude that the parties entered into a valid and enforceable agreement to arbitrate. See *Weekly Homes*, 336 S.W.3d at 415, 421 (where promise to arbitrate in employment agreement was illusory, arbitration agreement not enforceable). We therefore conclude that the county court did not abuse its discretion in refusing to compel the parties to arbitrate.⁶ See *Big Bass Towing Co. v. Akin*, 409 S.W.3d 835, 840–42 (Tex. App.–Dallas 2013, no pet.) (trial court did not abuse discretion in denying motion to compel arbitration where party did not sign arbitration agreement, had no notice of it, and did not ratify it). We overrule appellants’ first issue as to their interlocutory appeal.

Mandamus

In the second part of their first issue, and in their second and third issues, appellants contend the county court abused its discretion in denying mandamus relief as to arbitration, vacation of the dismissal, and sanctions. As we have previously observed, this request for relief is contained in what is styled as an appeal. However, appellants expressly challenge the county court’s denial of mandamus relief against the justice court and seek mandamus relief here under a clear abuse of discretion standard. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (one requirement relator must meet to be entitled

to mandamus relief is to show trial court’s clear abuse of discretion); cf. *Walden v. Baker*, No. 03–03–00253–CV, 2005 Tex. App. LEXIS 10446, at *1, *8, 2005 WL 3440778 (Tex. App.–Austin Dec. 15, 2005, no pet.) (mem. op.) (appeal challenged county court’s denial of writ of mandamus to justice court on grounds justice court lacked jurisdiction and did not seek mandamus relief in court of appeals).

Further, appellants do not appeal from a final judgment or order. The general rule is that an appeal may be taken only from a final judgment except where an interlocutory order is appealable by statute. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree. *Id.* Here, appellants sought mandamus against the justice court—the trial court—from the county court—sitting as the appellate court, putting this case in a different procedural posture from a final judgment in an original proceeding for mandamus initiated in the trial court, which is subject to appeal. See *Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 & n.1 (Tex. 1991) (distinguishing between appeal from final judgment in original proceeding for writ of mandamus initiated in trial court and original proceeding for writ of mandamus filed in appellate court, and noting that former is civil action “subject to trial and appeal on substantive law issues and the rules of procedure as any other civil suit,” while latter is governed by appellate rule 121, is not appealable to supreme court, but is reviewable by writ of mandamus in supreme court); *Simmons v. Kuzmich*, 166 S.W.3d 342, 345–46 (Tex. App.–Fort Worth 2005, no pet.) (abuse of discretion standard applicable to mandamus actions that originate in appellate courts not applied in appeals of mandamus action initiated in trial court).

*5 The denial of mandamus relief that is sought ancillary to a pending proceeding, as appellants sought here, is not an adjudication on the merits. See *Chambers v. O’Quinn*, 242 S.W.3d 30, 32 (Tex. 2007) (per curiam) (citing *In re AIU Ins. Co.*, 148 S.W.3d 109, 119 (Tex. 2004) (noting that “failure to grant a petition for writ of mandamus is not an adjudication of, nor even a comment on, the merits of a case in any respect, including whether mandamus relief was available”)). Thus, the parties’ claims remain pending in justice court, and the record contains no final order or judgment over which we have appellate jurisdiction. See *id.*; *Lehmann*, 39 S.W.3d at 195; cf. *City of Fort Worth v. Abbott*, 258

S.W.3d 320 (Tex. App.—Austin 2008, no pet.) (appeal from final order in mandamus proceeding initiated in trial court);

 *Simmons*, 166 S.W.3d 342 (appeal from final judgment in original proceeding for writ of mandamus initiated in trial court); *see also Senter v. Hudson*, 28 S.W.3d 153 (Tex. App.—Fort Worth 2000, no pet.) (appeal from county criminal court of appeals' denial of post-conviction petition for writ of mandamus compelling municipal judge to accept appeal bond); *but see In re Shea*, No. 01-98-01088-CV, 1998 Tex. App. LEXIS 6493, at *1–2, 1998 WL 724060 (Tex. App.—Houston [1st Dist.] Oct. 9, 1998, orig. proceeding) (if county court denies petition for writ of mandamus against justice of peace, relief is to appeal from denial) (citing *Crowder v. Franks*, 870 S.W.2d 568, 571 (Tex. App.—Houston [1st Dist.] 1993, no writ) (involving appeal from final judgment)).

Accordingly, because appellants do not appeal from a final order or judgment and seek mandamus relief in this Court, to the extent of appellants' request for mandamus relief, we treat this case as a petition for writ of mandamus. *See*

 *CMH Homes*, 340 S.W.3d at 454 (remanding interlocutory appeal of appointment of arbitrator to court of appeals for consideration as petition for writ of mandamus where there was no interlocutory jurisdiction and appellant requested mandamus relief in court of appeals and preserved issue in supreme court);  *Powell v. Stover*, 165 S.W.3d 322, 324 n.1 (Tex. 2005) (orig. proceeding) (treating case styled as appeal as petition for writ of mandamus where relator challenged denial of mandamus relief and did not appeal from final order);⁷ *Westbrook v. Fondren*, No. 02-09-00173-CV, 2009 Tex. App. LEXIS 7198, at *5, 2009 WL 2914311 (Tex. App.—Fort Worth Sept. 10, 2009, no pet.) (mem. op.) (per curiam) (where court had no statutory authority to review trial court's interlocutory order denying temporary restraining order, appeal dismissed for want of jurisdiction and case considered as petition for writ of mandamus); *see also*  *Texas Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 536–37 (Tex. 2012) (observing supreme court has long favored common sense application of rules over technical approach that promotes form over substance); *In re Cavazos*, No. 03-15-00005-CV, 2015 Tex. App. LEXIS 633, at *1, 2015 WL 307290 (Tex. App.—Austin Jan. 23, 2015, orig. proceeding) (mem. op.) (looking to substance of motion rather than title and construing “Nunc Pro Tunc Request for Order to Correct Records” as petition for mandamus).

Although neither party has raised the issue, we next consider our mandamus jurisdiction over this matter *sua sponte*. *See Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 587 (Tex. 2012) (op. on reh'g). “[A] court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.”  *University of Tex. Sw. Med. Ctr. At Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004), *superceded on other grounds*, Act of May 25, 2005, 79th Leg. R.S., ch. 1150,  § 1, 2005 Tex. Gen. Laws 3783, 3783 (codified at Tex. Gov't Code § 311.034). Because it is a legal question, we review de novo whether this Court has jurisdiction. *University of Hous. v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013) (per curiam);  *Weekley Homes*, 336 S.W.3d at 417. If the record does not affirmatively demonstrate our jurisdiction, we must dismiss the petition.  *Weekley Homes*, 336 S.W.3d at 417;  *IFS Sec. Grp., Inc. v. American Equity Ins. Co.*, 175 S.W.3d 560, 562 (Tex. App.—Dallas 2005, no pet.).

*6 Appellants ask this Court to “mandamus the County Court at Law” and order it to vacate the orders entered by the justice court vacating dismissal, denying AGSI's motion to compel arbitration, and awarding sanctions against DeMarco and Short. In considering appellants' petition for writ of mandamus, we are required to focus on the ruling of the justice court. *See*  *Powell*, 165 S.W.3d at 324 (in considering relator's petition, court focuses on trial court's ruling). Our focus must remain on the justice court's orders regardless of the county court's decision on mandamus. *See*  *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding) (“Our focus remains on the trial court's order regardless of the court of appeals' decision on mandamus.”). “We make an independent inquiry whether the trial court's order is so arbitrary, unreasonable, or ... prejudicial ... as to establish abuse of discretion.” *Id.*; *see also*  *In re Lee*, 411 S.W.3d 445, 461 (Tex. 2013) (orig. proceeding) (granting mandamus relief ordering trial court to withdraw orders denying entry of judgment based on mediated settlement agreement and setting matter for trial where court of appeals denied petition for mandamus); *In re Dean*, 393 S.W.3d 741, 750–51 (Tex. 2012) (orig. proceeding) (granting writ of mandamus ordering trial court to confer with New Mexico Court of Appeals pursuant to Family Code where court of appeals denied mandamus relief);  *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 690 (Tex. 2012)

(orig. proceeding) (granting writ of mandamus ordering trial court to vacate judgment where court of appeals denied mandamus relief). Thus, in seeking relief from the county court's denial of mandamus, appellants are in essence asking us to issue mandamus against the justices of the peace who issued the challenged orders while sitting as judge of the justice court. See  Tex. Gov't Code § 28.002, repealed by Act of June 27, 2011, 82d Leg., 1st C.S., ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225 (justice of peace sits as judge of justice court).

We lack jurisdiction to issue a writ of mandamus against a justice of the peace or justice court unless it is necessary to preserve our jurisdiction. *See id.* § 22.221 (writ power of court of appeals); *Mullins v. Holt*, No. 10-13-00114-CV, 2013 Tex. App. LEXIS 6128, at *8, 2013 WL 2257151 (Tex. App.-Waco May 9, 2013, no pet.) (mem.op.) (court of appeals has no jurisdiction to issue writ of mandamus against judge of justice court unless necessary to preserve jurisdiction); *Rodriguez v. Womack*, No. 14-10-01213-CV, 2012 Tex. App. LEXIS 49, at *5, 2012 WL 19659 (Tex. App.-Houston [14th Dist.] Jan. 5, 2012, pet. denied) (mem.op.) (noting court of appeals' lack of jurisdiction to issue mandamus against justice court). Appellants do not argue or show that a writ of mandamus is necessary to preserve our jurisdiction. Therefore, we lack jurisdiction to issue a writ of mandamus against the justice of the peace or justice court. *See In re Smith*, 355 S.W.3d 901, 901-02 (Tex. App.-Amarillo 2011, orig. proceeding) (per curiam) (where appellants did not argue or show writ was necessary to preserve jurisdiction, appellate court lacked jurisdiction to issue writ of mandamus against justice of peace). Where we have no jurisdiction to issue mandamus against the justice of the peace or justice court directly, we cannot conclude that the record affirmatively demonstrates that we have jurisdiction to do so indirectly by way of the county court, as appellants ask us to do. *See*  *Weekley Homes*, 336 S.W.3d at 417;  *IFS Sec. Grp.*, 175 S.W.3d at 562. We therefore dismiss for want of jurisdiction appellants' request for mandamus relief as stated in issues one

through three.⁸ *See*  *Weekley Homes*, 336 S.W.3d at 417;  *IFS Sec. Grp.*, 175 S.W.3d at 562.

Frivolous Appeal

As a final matter, PGD contends that this appeal is frivolous and asks this Court to sanction appellants pursuant to **Texas Rule of Appellate Procedure 45**. *See Tex. R. App. P. 45* (appellate court may award prevailing party just damages if it determines appeal is frivolous). To determine if an appeal is frivolous, we apply an objective test, review the record from the appellant's point of view, and decide whether he had reasonable grounds to believe the judgment could be reversed.

 *Elm Creek Villas Homeowner Ass'n, Inc. v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 155 (Tex. App.-San Antonio 1996, no writ); *Hunt v. CIT Group/Consumer Fin., Inc.*, No. 03-09-00046-CV, 2010 Tex. App. LEXIS 2767, at *27, 2010 WL 1508082 (Tex. App.-Austin Apr. 15, 2010, pet. denied) (mem. op.). “The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation.” *Ackel v. Ackel*, No. 01-11-00061-CV, 2011 Tex. App. LEXIS 8958, at *5, 2011 WL 5429064 (Tex. App.-Houston [1st Dist.] Oct. 6, 2011, no pet.) (mem.op.). Having fully considered PGD's request for sanctions, we deny that request. *See Tex. R. App. P. 45*.

CONCLUSION

*7 We affirm the trial court's order refusing to compel arbitration and dismiss the mandamus petition for want of jurisdiction in all other respects.⁹

All Citations

Not Reported in S.W. Rptr., 2015 WL 1882267

Footnotes

¹ Geothermal HVAC systems involve drilling multiple ground loops that extend several hundred feet into the earth through which liquid is circulated in order to cool the air using the temperature of the earth rather than the outside air.

- 2 Although it appears that Denny—not PGD counsel—filed the suit, the record reflects that PGD was represented by counsel both before and after suit was filed.
- 3 Appellants also previously filed a Petition for Writ of Mandamus with this Court seeking mandamus relief against the justices of the peace who issued the orders in the justice court. That petition was denied for want of jurisdiction. See *In re Twenty First Century Holdings, Inc.*, No. 03-13-00310-CV, 2013 Tex. App. LEXIS 6430, at *1, 2013 WL 2347758 (Tex. App.—Austin May 24, 2013, orig. proceeding) (mem.op.); see also Tex. Gov't Code § 22.221 (writ power of court of appeals).
- 4 Government Code sections 28.052 and 28.053 were repealed by Act of June 27, 2011, 82d Leg., 1st C.S., ch. 3, §§ 5.06, 5.09, 2011 Tex. Gen. Laws 5206, 5225, effective May 1, 2013, which abolished justice courts.
- 5 Although appellants invoke the Texas Arbitration Act in their brief, see generally Tex. Civ. Prac. & Rem. Code §§ 171.001–.098, the settlement agreement does not refer to either the TAA or the Federal Arbitration Act, see generally 9 U.S.C. §§ 1–16.
- 6 In addition, there is no evidence in the record that the dispute was “first submitted to mediation,” as required by the settlement agreement. Thus, even if we were to conclude that the settlement agreement was fair and the arbitration clause was valid and enforceable, appellants’ attempt to enforce arbitration was premature, and we would conclude that the county court did not abuse its discretion in refusing to compel arbitration on this additional ground.
- 7 In *Powell*, the trial court denied relator’s plea in abatement and motion to dismiss for lack of jurisdiction, and the court of appeals denied mandamus relief. See *Powell v. Stover*, 165 S.W.3d 322, 324 (Tex. 2005). The relator “appealed” the decision, and the supreme court treated the case as a petition for writ of mandamus and granted writ of mandamus against the trial court. See *id.* at 324 n.1, 328.
- 8 Even if we were to conclude we have jurisdiction, mandamus relief would not be proper. This cause is still pending in justice court. Once the justice court has ruled, appellants may then appeal to the county court. See Tex. Gov’t Code § 28.052, repealed by Act of June 27, 2011, 82d Leg., 1st C.S., ch. 3, § 5.06, 2011 Tex. Gen. Laws 5206, 5225. Since appeal to the county court is trial do novo, appellants can re-urge their arguments in the county court. See *id.*; Tex.R. Civ. P. 574b, repealed 2013. Therefore, appellants have an adequate remedy at law, and mandamus relief is not proper. See *Grimm v. Garner*, 589 S.W.2d 955, 955, 957 (Tex. 1979); *In re A.F.* No. 05-05-01435-CV, 2006 Tex. App. LEXIS 5483, at *2, *4–5, 2006 WL 1728035 (Tex. App.—Dallas June 13, 2006, pet. denied) (mem. op.).
- 9 Appellants have filed a motion to abate this appeal pending this Court’s ruling on its prior petition for writ on mandamus. We dismiss the motion as moot.

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